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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner

v.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

E. BARRETT PRETTYMAN, JR., ESQUIRE *
LEE LOEVINGER, P.C.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

HENRY LOBLE, ESQUIRE
PETER C. PAULY, ESQUIRE
LOBLE & PAULY, P.C.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601
(406) 442-0070

BOYD L. HENDERSON, ESQUIRE
Associate General Counsel
Tennessee Gas Transmission
Tenneco Building
P. O. Box 2511
Houston, Texas 77001
(713) 757-3078

* *Counsel of Record*

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the Yellowstone River Compact, which was approved by the signatory States of Montana, Wyoming and North Dakota and by the United States Congress, *require* Montana to recognize a priority of filing in Wyoming, even though the water which is the subject of that filing is to be used in Montana and was apportioned to Montana under the Compact, and Article XVIII of the Compact specifically provides that no signatory State shall be divested of jurisdiction of the water appropriated to that State?

2. In a case in which Petitioner has never received a hearing, did the Montana Supreme Court violate the Yellowstone River Compact by ruling that Montana officials acted legally and pursuant to the Compact when they effectively divested Petitioner of its senior priority of filing for the use of water in Montana by recognizing a prior competing filing in Wyoming, even though the competing filing, when accomplished in Montana, was subsequent in time to that of Petitioner?

PARTIES TO THE PROCEEDINGS *

The parties before the Supreme Court of the State of Montana were the same parties listed as Petitioner and Respondents on the cover of this Petition.

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* Petitioner Intake Water Co. reports, pursuant to Rule 28.1 of the Rules of this Court, that it has a parent and certain affiliates. Because of the large number of such entities, they are set forth in Appendix I (App. 104a) hereto.

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OPINIONS BELOW

The order of the District Court of the First Judicial District, in and for the County of Lewis and Clark, State of Montana, staying all proceedings in that court pending a ruling of the Federal District Court, dated December 15, 1975, is not reported but appears as Appendix A

(App. 1a) hereto. The opinion of the United States District Court for the District of Montana declining jurisdiction in this case but construing the Yellowstone River Compact, dated December 5, 1979, is reported at 484 F. Supp. 36 and appears as Appendix B (App. 3a) hereto. The order of the State District Court dissolving its stay, dated January 8, 1980, is not reported but appears as Appendix C (App. 23a) hereto. The opinion and order of the State District Court quashing and dismissing Petitioner Intake's Amended Affidavit and Application for Writ of Mandate, filed February 25, 1981, is not reported but appears as Appendix D (App. 25a) hereto. The judgment of the State District Court dismissing with prejudice any further mandamus proceedings by Petitioner Intake but without prejudice to any other remedy Intake might have, dated March 16, 1981, is not reported but appears as Appendix E (App. 47a) hereto.

The opinion of the Supreme Court of the State of Montana affirming the order of the State District Court, dated April 15, 1982, is reported at 645 P.2d 383 and appears as Appendix F (App. 49a) hereto. The order of the Supreme Court of the State of Montana denying Petitioner Intake's Petition for Rehearing, dated May 13, 1982, is not reported but appears as Appendix G (App. 59a) hereto.

JURISDICTION

The opinion and order of the Montana Supreme Court, from which certiorari is sought, was rendered on April 15, 1982 (App. 49a). A timely Petition for Rehearing was filed by Petitioner on April 23, 1982, and was denied on May 13, 1982 (App. 59a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Petitioner raised the issues involved here under the Yellowstone River Compact—and particularly the correct construction and application of Article XVIII of that Compact—at the very outset of this case, even before its

"Amended Affidavit and Application for Writ of Mandate" had been filed, and continued to raise and argue these issues through State and Federal trial courts, in its briefs to the Montana Supreme Court, and in its Petition for Rehearing to that court.[1]

RELEVANT STATUTE AND COMPACT

The Yellowstone River Compact, which was consented to by Congress on June 2, 1949, Public Law 83, 81st Cong., 1st Sess., and approved by the signatory States and then by Congress, Act of October 20, 1951, 63 Stat. 152, Public Law 231, Ch. 629,[2] and the relevant portions of the Montana Water Use Act of 1973, Title 89, Ch. 8, Revised Codes of Montana, 1947 (now Title 85, Ch. 2, Montana Code Annotated), are set forth as Appendix H (App. 61a) hereto.

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[1] *E.g.*, "Plaintiff and Relator's Memorandum in Opposition to Motions to Quash and Dismiss," filed May 29, 1975, at pp. 17, 39-41 (hereinafter "Intake's May 29, 1975, Memo"); "Plaintiff and Relator's Memorandum in Opposition to Motions to Quash and Dismiss Amended Affidavit for Writ of Mandate", filed April 4, 1980, at pp. 25, 48, 52-63 (hereinafter "Intake's April 4, 1980, Memo"); "Post Hearing Brief and Memorandum of Plaintiff and Relator, Intake Water Company", filed December 30, 1980, at pp. 10-12 (hereinafter "Intake's December 30, 1980, Brief and Memo"); "Initial Brief of Plaintiff, Relator and Appellant, Intake Water Company", filed in the Montana Supreme Court on September 25, 1981, at pp. 32-45, 63 (hereinafter "Intake's September 25, 1981, Initial Brief"); "Reply Brief of Plaintiff, Relator and Appellant, Intake Water Company", filed in the Montana Supreme Court on February 12, 1981, at pp. 37-46, 48 (hereinafter "Intake's February 12, 1981, Reply Brief"); Petitioner's "Intake's Petition for Rehearing", filed in the Montana Supreme Court on April 23, 1982, at pp. 13-20, 22 (hereinafter "Intake's April 23, 1982, Petition for Rehearing").

[2] The Compact is currently codified by Montana as Title 85, Chapter 2, Montana Code Annotated (Chaper 9, Title 89, Revised Codes of Montana, 1947, § 89-903).

STATEMENT OF FACTS

The Yellowstone River and its major tributaries rise in Wyoming, flow through Montana, and then join the Missouri River just inside the North Dakota border. Together, they form the Yellowstone River Basin. The Powder River, which begins in Wyoming and ends in Montana, is a tributary of the Yellowstone River and is located in the Yellowstone River Basin.

In 1949, Congress consented to the enactment of the Yellowstone River Compact between the States of Wyoming, Montana and North Dakota. The Compact was subsequently adopted by these three States and then approved by the United States Congress in 1951 (63 Stat. 152, Public Law 231, Ch. 629). The primary purpose of the Compact, according to its Preamble, is "to provide for an equitable division and apportionment" of the waters of the Yellowstone River Basin, and to "remove all causes of present and future controversy" between States and persons with respect to the River and its tributaries. The Compact apportions 58% of the Powder River waters to Montana, and 42% to Wyoming. Art. V(B)(4) (App. 66a).

On November 20, 1973, Respondent Utah International, Inc. ("Utah"), filed in Wyoming an application for a permit to appropriate surface water of the Powder River. The application specifically recited that it "pertain[ed] to the diversion in the State of Wyoming of presently unused and unappropriated water of the Powder River *allocated to the State of Montana for beneficial use in that state (Montana)* pursuant to Article V(B)(4)(a)" of the Compact (emphasis added).[3] In other words, Utah

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[3] "Amended Affidavit and Application for Writ of Mandate", dated and filed August 18, 1975, in the State District Court, at Ex. B, pp. 2, 7, 12 (hereinafter "Amended Affidavit").

The amount of water to be diverted and put to beneficial use in Montana was specified to be 80,375 acre feet ("A.F.") for industrial

intended to appropriate water apportioned and allocated to Montana under the Compact, divert and store the water in Wyoming, and then transport it to, and use it in, Montana.

Shortly after it filed in Wyoming, Utah made what purported to be a proper filing of copies of the same papers in Montana pursuant to Article VII(B) (App. 69a) of the Compact.[4] Utah was thereafter informed by

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use, 7,610 A.F. for irrigation and reclamation, 2,090 A.F. for municipal use, and 14,325 A.F. for recreation, fish and wildlife (*id.* at p. 11), for a total of 104,400 A.F.

[4] Petitioner has alleged throughout these proceedings that the papers filed by Utah in Montana were defective, no filing fee was paid at the time of filing as required by state law, and the papers were not returned as defective in order to have them corrected in a timely fashion as provided for in the governing statute. *E.g.*, Amended Affidavit, *supra* n. 3, at p. 5, Pars. VII, VIII; Intake's May 29, 1975, Memo, *supra* n. 1, at pp. 3, 5, 42-43; Intake's April 4, 1980, Memo, *supra* n. 1, at pp. 9, 64-66; Intake's December 30, 1980, Brief and Memo", *supra* n.1, at pp. 6-7, 13-14, 16-17; Intake's September 25, 1981, Initial Brief, *supra* n. 1, at 9; Intake's February 12, 1982, Reply Brief, *supra* n. 1, at pp. 23-27, 43; Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at pp. 8, 10.

Respondents have virtually conceded as much. Utah's "Memorandum in Support of Utah International, Inc.'s Motions to Dismiss and to Quash", filed May 8, 1975, at p. 19 (hereinafter "Utah's May 8, 1975, Memo"); "Defendants and Respondents [sic] Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and to Dismiss the Amended Affidavit for Writ of Mandate", filed June 30, 1980, at pp. 4, 5, 16-18 (hereinafter "Respondents' June 30, 1980, Memo"); "Brief of Defendant and Respondent, Utah International, Incorporated", filed June 30, 1980, at pp. 21-24, 33-41 (hereinafter "Utah's June 30, 1980, Brief"); "Defendants' and Respondents' Supplemental Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and to Dismiss the Amended Affidavit for Writ of Mandate", filed December 10, 1980, at pp. 2, 5 (hereinafter "Respondents' December 10, 1980, Supplemental Memo"); "Brief of Respondent, Utah International, Incorporated", filed October 26, 1981, at pp. 5-6, 23-26, 28 (hereinafter "Utah's October 26, 1981, Brief"); "Brief of Defendants, Respondents and Respondents on Appeal, Board of Natural Resources and Conserva-

Montana water authorities that in order to perfect its filing, it had to apply for a permit under Montana law.[5] Although Utah replied that it did intend to apply for such a permit,[6] it was not until January 14, 1975, that Utah filed its application in Montana on that State's form with the prescribed filing fee.[7]

In the meantime, on September 27, 1974, Petitioner had filed applications for permits in Montana and Wyoming (with duplicate copies in both States), seeking to appropriate waters of the Powder River for diversion, storage and beneficial use in Montana and Wyoming, pursuant to the Yellowstone River Compact.[8] Because of the amount of water sought in the competing applications of Utah and Petitioner, the granting of permits to either party would preclude the granting of permits to

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tion of the State of Montana, et al.", filed December 18, 1981, at p. 11 (hereinafter "Respondents' December 18, 1981, Brief"); "State of Montana's Objection to Petition for Rehearing", filed April 30, 1982, at p. 7 (hereinafter "Montana's April 30, 1982, Objection"); Utah's "Objections to Petition for Rehearing", filed April 30, 1982, at pp. 5, 8 (hereinafter "Utah's April 30, 1982, Objections").

For example, Utah admitted that Montana water officials "did not actually return the Wyoming forms to Utah for correction * * *" (Utah's June 30, 1980, Brief, *supra*, at p. 24).

Since the Montana Supreme Court apparently treated Utah's papers as if they had been properly filed in Montana as a matter of State law (App. 51a-52a), these issues are not directly before this Court. However, they do provide background and perspective in regard to the way Petitioner has been treated vis-a-vis Utah throughout the proceedings below.

[5] Utah's May 8, 1975, Memo, *supra* n. 4, at App. B, D, F.

[6] Intake's April 4, 1980, Memo, *supra* n. 1, at Ex. 4.

[7] Amended Affidavit, *supra* n. 3, at pp. 6-7, Par. XI.

[8] *Id.* at pp. 5-6, Pars. IX, X, Ex. C, D. Intake sought 245,000 A.F. for industrial use, 35,000 A.F. for municipal use, 38,700 A.F. for irrigation purposes, and 245,700 A.F. for sediment storage (*id.* at Ex. C, p. 2; Ex. D, p. 1), for a total of 564,400 A.F.

the other.[9] Therefore, the correctness of priority dates in the filing of appropriate papers has always been the core issue in this lawsuit.

As outlined above, there are three dates that are central to a resolution of the priority issue: November 20, 1973, when Utah filed in Wyoming; September 27, 1974, the date on which Petitioner filed in both Montana and Wyoming; and January 14, 1975, when Utah formally filed in Montana.

Despite original doubts of Montana water officials about the meaning of the Compact,[10] they ultimately concluded that they were required by Article VII(C) to defer to Wyoming and look to Wyoming law in assigning a date of priority to Utah's application filed in Montana. As a result, instead of assigning Utah a priority date of January 14, 1975, which was junior to Petitioner's filing, Montana water officials gave a retroactive application to Utah's Montana filing using the Wyoming date (November 20, 1973), a date senior to the date of priority assigned Petitioner's filing.[11] Thus, if Utah is ultimately granted a permit on its application, Petitioner will be entirely excluded from its planned $35,700,000 project (an original estimate which has dramatically increased over time).

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[9] Respondents Board and Department's "Memorandum in Support of Motion to Quash and Dismiss the Amended Affidavit and Application for a Writ of Mandate," filed October 16, 1975, at p. 3 (hereinafter "Respondents' October 16, 1975, Memo").

[10] See Utah's May 8, 1975, Memo, *supra* n. 4, at App. C.; Respondent Department's "Memorandum in Support of Motion to Quash and Dismiss," filed May 7, 1975, at p. 4; Respondents' June 30, 1980, Memo, *supra* n. 4, at p. 17.

[11] *E.g.*, Amended Affidavit, *supra* n. 3, at pp. 8, 9-11, Pars. XV, XVIII; Respondents' December 18, 1981, Brief, *supra* n. 4, at pp. 1, 4, 17-18 ("The priority date of Utah's appropriation rights is determined by Wyoming, the situs of the water rights").

Petitioner brought suit in the Montana District Court for a Writ of Mandate, grounded upon an Affidavit (and, subsequently, an Amended Affidavit) which set forth the relevant facts. It was Petitioner's position that the Yellowstone River Compact, when properly interpreted in conjunction with Montana law, did *not* require Montana to defer to Wyoming in awarding priorities but rather provided that Montana would establish its own priority as to water apportioned to that State under the Compact. As already noted (*supra* n.1), Petitioner principally relied upon Article XVIII of the Compact, which provides:

> No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact. [App. 72a.]

Petitioner argued that it was entitled to mandamus because, under the Compact, Montana officials had no discretion in assigning priority dates, but rather had a legal duty to recognize the "first in time, first in right" priority date of Petitioner in assigning a priority date to Utah's January 14, 1975 filing in Montana.

Respondents contended that Petitioner had adequate remedies at law, but then went on to argue the proper interpretation of the Compact. They maintained that Montana water officials had no alternative but to assign to Utah the priority date in Montana that it had been granted by Wyoming.[12]

Before the Montana District Court could rule, Utah filed a declaratory judgment action in the United States District Court for the District of Montana, urging its interpretation of the Compact and Montana law upon that

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[12] *E.g.*, "Memorandum in Support of Motion to Quash and Motion to Dismiss Filed on Behalf of Utah International, Incorporated," filed October 16, 1975, at p. 14 (hereinafter "Utah's October 16, 1975, Memo").

court. The State District Court proceedings were thereupon stayed (App. 1a). The Federal District Court first purported to take jurisdiction for the purpose of interpreting the Compact (App. 14a-15a). However, the court then decided that, because Montana law concerning the effect of the Compact upon the terms of the Montana Water Use Act (App. 73a) was unsettled, "this Court finds that it must abstain from the exercise of its jurisdiction in this case, and, further, that this cause should proceed in the courts of the State of Montana" (App. 21a).

The Federal District Court's comments about the Compact thus become relevant only to the extent that they may have influenced the later decision of the Montana Supreme Court, from which certiorari is sought. Those comments include some with which Petitioner would agree—namely, that "the drafters intended that the Compact not operate in derogation of the sovereignty of any signatory state" (App. 17a), that Article VII (B) contemplates "an operation of the joint sovereignty of the states involved" (*id.*), that "* * * the law of each sovereign is implicated in determining the issues surrounding a given appropriation" (*id.*), that after an *adjudication* has taken place,[18] a permit may be issued and water rights established "in conformity with both the law and the overall *water use* policy of the states" (App. 18a; emphasis added), and that "* * * Wyoming does not, as [Utah] has argued, have the sole jurisdiction to adjudicate the water right in issue" (*id.*). However, by then adding that "Wyoming is the state of diversion for the appropriation sought by both parties, thus mandating the application of Wyoming law in any adjudica-

[18] As Utah admits, no such "adjudication" or the award of permits has yet taken place. See Utah's October 16, 1975, Memo, *supra* n. 12, at p. 17; Utah's October 26, 1981, Brief, *supra* n. 4, at pp. 14-16.

tion * * *" (App. 18a-19a), and "[t]he Montana courts are perfectly able to apply the law of Wyoming" in the course of the proceedings pending before the Montana District Court (App. 19a), the Federal court appeared to give credence to Utah's position, thus ignoring, in Petitioner's view, the mandate of Article XVIII.

The State District Court then dissolved its stay (App. 23a) and proceeded to rule upon Petitioner's pending Writ of Mandate. It quashed and dismissed the Writ not because there were alternative remedies at law available, but because "the action of [Montana water officials] is in direct accord with the Yellowstone River Compact * * *" (App. 46a). In so ruling, the court relied upon a number of cases involving compacts or statutes that did not contain provisions comparable to Article XVIII (App. 36a-38a). As to that Article, the court adopted the language favorable to Utah quoted above from the Federal District Court's opinion (App. 41a). The State court appeared to attempt to distinguish between control over water apportioned to a State and control over water once that water has physically reached the border of the State (*id.*). The State District Court entered a judgment dismissing Petitioner's Writ of Mandate with prejudice but without prejudice to any other remedy available (App. 47a).

On appeal, the Montana Supreme Court affirmed (App. 49a). Although the court took note of Article XVIII (App. 55a-56a), it did not discuss its meaning or attempt to reconcile other Articles in the Compact with the terms of Article XVIII. Instead, after setting forth a shorthand expression of each side's position, the court simply concluded that under Article VII(C), since Wyoming was the State of diversion, Montana water officials "correctly assigned the November 20, 1973, priority date to Utah in conformity with Wyoming law as required by the Compact" (App. 57a).

Thus, in a case in which Petitioner has never received a factual hearing or adjudication,[14] in which the allegations of its Amended Affidavit were supposed to have been accepted as true for purposes of a ruling upon Petitioner's Writ,[15] and in which the State courts were theoretically deciding only whether mandamus would lie, those courts in fact have ignored certain facts in the Amended Affidavit and have proceeded finally to pass upon the critical provisions of the Compact, thus foreclosing Petitioner from any other remedy[16] in regard to the Compact, at law or otherwise, except certiorari in this Court.[17]

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[14] Petitioner repeatedly pointed out the denial of its right to an evidentiary hearing and the reliance of the State courts upon facts not in evidence or contrary to those in the Amended Affidavit. *E.g.*, Intake's September 25, 1981, Initial Brief, *supra* n. 1, at pp. 12, 14-15; Intake's February 12, 1982, Reply Brief, *supra* n. 1, at pp. 2, 8, 9, 12, 14-15; Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at pp. 5-6, 10-11, 18.

[15] Not only did Intake argue this, but Respondents conceded it. Intake's December 30, 1980, Brief and Memo, *supra* n. 1, at p. 5; Respondents' December 18, 1981, Brief, *supra* n. 4, at p. 9.

[16] Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at p. 6; *cf. Sporhase* v. *Nebraska ex rel. Douglas*, 50 U.S.L.W. 5115, 5116 n. 2 (U.S. July 2, 1982).

[17] The Montana Supreme Court added to its opinion what would appear on the surface to be an alternative, State-law holding. It ruled that Intake could not even prevail under Montana law, because Utah had up to 18 months to correct a defective filing, and Utah filed the appropriate Montana forms within that period (App. 57a). Upon closer inspection, however, it is clear that this conclusion is premised upon the concept that Montana was required under the Compact to give effect to the Wyoming priority date, if properly filed in Montana. This is borne out by the next succeeding sentence in the opinion: The Montana water officials "correctly assigned Utah the priority date of *its first filing* [in Wyoming]" (*id.*; emphasis added).

Thus, if this Court were to hold that Montana was not duty bound to give effect to the Wyoming filing, the question of whether or not Utah corrected its papers in Montana would become irrele-

REASONS FOR GRANTING THE WRIT

1. The Importance of the Issues.

The outcome of this case is of importance, of course, to the two competing companies whose multi-million dollar projects are at stake.[18] More importantly, the outcome will affect many thousands of citizens who will receive direct benefits, or be deprived of them, depending upon which project is able to obtain the water at issue. These are not only the people of Montana, Wyoming and North Dakota, but the residents of other States of this Nation as well.

Petitioner is a water company organized for the purpose of selling, renting and distributing water to customers for industrial, municipal and irrigation purposes. Petitioner's application seeks to appropriate all of the unappropriated and surplus waters of the Powder River. Its project is a multi-purpose one, whose benefits will accrue over a wide region, as distinguished from Utah's, which is a single-purpose project to provide water for a coal gasification facility. The area in which the Yellowstone River and its tributaries are located—which is part of the area impacted by Petitioner's Project—is an arid one even by Western standards. It includes vast irrigable or irrigated lands. It is a region in which the largest single coal deposits in the United States—the Powder

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vant, because Montana would then be free to apply its own "first in time, first in right" priority dates without regard to what Utah did in Wyoming.

[18] As previously mentioned, the cost to Petitioner for its project was originally estimated to be $35,700,000 (Intake's April 4, 1980, Memo, *supra* n. 1, at Ex. 6). If it is granted a permit, it will have to make at least a $288,500 payment to Montana authorities for an Environmental Impact Statement (*id.*). The original estimated cost to Utah of its project is $38,000,000, and it will have to make at least a $300,000 payment if its permit is granted (*id.* at Ex. 7). Presumably, all of these figures have increased since they were originally estimated.

River Basin coal deposits—are located. Water is critical to the development and use of these lands for irrigation purposes. Water is equally essential, if not more so, from the standpoint of development of the energy resources to be found in the area, for which the Powder River is the only reasonably accessible water supply available to achieve these goals.

Thus, it is vitally important to have a definitive decision from this Court interpreting Article XVIII of the Yellowstone River Compact in conjunction with the Compact's other Articles. Such a decision is needed *now*, for present application in the signatory States. But it is also important for the future, because while Article XVIII is a new provision, heretofore not included in other interstate compacts, it undoubtedly will become more and more of a fixture in the years ahead. It is thus a matter of some urgency for all of the Western States to understand the dimensions and implications of such a provision before they enact it into new compacts—particularly when those compacts may well supersede, take precedence over, or effectively amend their own State constitutions and statutes.

Article XVIII is an attempt to preserve to each individual State the application of its own law to the extent that water is apportioned to that State. The Montana Supreme Court's ruling goes in precisely the opposite direction. It decrees, for a State which has had water apportioned to it under the Compact, a mandatory deference to the laws of *other* States. Only this Court can realign this juxtaposition of requirements and make clear in what respect the law of each State controls. This realignment takes on particular significance when the subject matter is water, for as this Court has often noted,[19] water and its allocation are the life-blood of the West.

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[19] See, *e.g.*, most recently, *Sporhase* v. *Nebraska ex rel. Douglas*, *supra*, 50 U.S.L.W. at 5118.

It is no overstatement, therefore, to predict that this Court's determination of what an Article XVIII is intended to bring about will have an impact upon citizens in all our States throughout the years to come.

2. The Decision Below Was Wrong.

As the Montana Supreme Court correctly pointed out, an interstate compact approved by Congress takes precedence over State law. It is, absent a violation of the United States Constitution, the supreme law of the land and, as such, is subject to final interpretation by this Court. *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102-107 (1938); *Dyer* v. *Sims*, 341 U.S. 22, 28 (1950); *Petty* v. *Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 278 (1959); see *Sporhase* v. *Nebraska ex rel. Douglas*, *supra*, 50 U.S.L.W. at 5118, 5120.

Nevertheless, Petitioner has been frustrated throughout the proceedings below by Respondents' refusal to discuss Article XVIII of the Yellowstone River Compact at all,[20] or by their brief references to it without any cogent attempt to reconcile the other provisions of the Compact with Article XVIII.[21] The State District Court and the

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[20] "Reply Memorandum on Behalf of Utah International, Inc. in Support of Motions to Quash and Dismiss," filed June 11, 1975 (hereinafter "Utah's June 11, 1975, Reply"); Respondents' June 30, 1980, Memo, *supra* n. 4; Respondents' December 10, 1980, Supp. Memo, *supra* n. 4; Respondents' December 18, 1981, Brief, *supra* n. 4 (main, 31-page brief before Montana Supreme Court).

[21] "Defendants' Reply to Plaintiff's Memorandum in Opposition to Motions to Quash and Dismiss," filed June 9, 1975, at p. 9; Respondents' October 16, 1975, Memo, *supra* n. 9, at pp. 10-11; Utah's October 16, 1975, Memo, *supra* n. 12, at p. 13; Utah's June 30, 1980, Brief, *supra* n. 4, at pp. 13, 20; "Department of Natural Resources and Conservation (Defendants) Supplemental Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and Dismiss the Amended Affidavit for Writ of Mandate", filed December 31, 1981,. at pp. 1-2; Utah's October 26, 1981, Brief,

Montana Supreme Court followed the same lead—referring to Article XVIII but then failing to interpret or apply the Article's mandate (App. 41a-42a, 55a-56a). We suggest that the reason for this cavalier treatment is due to a failure to reconcile the views of the Compact advanced by Respondents and adopted by Montana's highest court with the mandate of Article XVIII.

The Montana Supreme Court looked to only one of the Compact's provisions, Article VII(C), for a resolution of the parties' differences. That provision reads:

> (C) Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used. [App. 69a.]

The court, without elaboration, proceeded directly from this language to the conclusion that since Wyoming is the State of diversion in this case, Montana water officials correctly assigned Utah's Wyoming priority date to Utah's application in Montana (App. 57a), thus effectively preempting Petitioner's Montana priority date. The court ignored the fact that no adjudications have actually been made in either State. It further ignored the fact that by the use of the word "may", the Article does not require that appropriations be adjudicated in the State where the water is diverted. Even more to the point, the court gave no effect to the provisions of Article XVIII:

> No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or in-

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supra n. 4, at pp. 46-47, 48; Montana's April 30, 1982, Obj., *supra* n. 4, at pp. 9-10, 12; Utah's April 30, 1982, Obj's., *supra* n. 4, at pp. 8-9.

terpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact. [App. 72a.]

There is no question but that the waters sought by both competing companies are those apportioned to Montana under the Compact, and the competing water is intended for beneficial use in Montana by both companies (see *supra* pp. 4-5, 6).[22] The plain language of Article XVIII, therefore, can have no other meaning but that as to this particular water, Montana has jurisdiction to assign its own priority date to filings in that State and need not defer to the priority jurisdiction of any other State.

The key question thus becomes: How can the appropriation of Utah, if granted, be a Wyoming right with a priority assigned under Wyoming law, if the waters which are the subject matter of the appropriation are to be charged against the allocation of water to Montana under the Yellowstone River Compact, and such waters are to be used in Montana? If Wyoming law were to control the priority date of appropriation of any waters of the Powder River diverted in Wyoming but allocated to Montana, there would never be any necessity for filing an application for a beneficial water use permit in Montana under Montana law with respect to such waters, as all parties agree must be done.

Respondents have argued that by requiring the State's own permit, Montana can insure that water counted against its allocation is wisely and beneficially used *within its own borders* (Respondents' June 30, 1980, Memo,

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[22] Utah has conceded, for example, that its application, if granted, will apply to water charged against *Montana's* allocation under the Compact (Utah's May 8, 1975, Memo, *supra* n. 4, at pp. 17-18), and that the water it seeks is to be used in Montana and has been allocated to Montana (Utah's October 26, 1981, Brief, *supra* n. 4, at pp. 2-4, 25; see also *supra* n. 3).

supra n.4, at p. 15). But one must ask how Montana can accomplish this task if a Wyoming priority has already effectively determined how such water will be used in Montana. Conversely, the enforcement of a Wyoming priority will prohibit what may well be the most wise and beneficial use of the water within Montana—namely, the use to which Petitioner proposes to put the water in its own project. And as to Utah's project, would Montana be free to stop the water at its border's edge on the ground that Utah's contemplated use was neither wise nor beneficial for Montana?

We submit that Article VII(C), in providing that each adjudication shall conform to the laws of the State of diversion and be recorded in the County and State where the water is to be used, merely means that the State of diversion is to make a determination under its own laws that the appropriation will not cause injury to the appropriators of that State, in that the reservoir site, diversion works, aqueduct and all other aspects pertinent to such diversion are in the best interests of the appropriators of that State. The adjudication to this effect is then to be recorded in the County and State of use for the information of any interested parties. On the other hand, under Article XVIII, Montana is awarded absolute and controlling authority over water apportioned to it by the Compact, and Montana law should then be applied to determine whether Montana wants this particular water used in the State and debited against Montana's apportionment of water under the Compact. This interpretation comports with the concept that the law of the state of *use* should determine the date of priority of an appropriation which is the subject matter of any adjudication where the waters involved are allocated to the State of use under a compact.

It is difficult to understand how Utah can admit that Montana law controls all priorities as to water which

reaches Montana,[23] and yet assert that Montana has no control over water which has already been apportioned and allocated to, and which is destined for beneficial use within, that State. Utah's position would make sense as to water which is allocated to the *diverting* State, because that State obviously would have the primary interest in protecting both its own allocation and the use to which the water is to be put. But a State which has relatively little interest in the water except to divert it is more like a stakeholder, or the cutodian of an escrow account;[24] its interest in the water is minimal when compared with that of the ultimate "owner" and user of the water.[25]

In its effort to justify the rulings below, Utah has made two totally inconsistent arguments. On the one hand, it has contended that Wyoming law controls, and that Montana officials need only have routinely processed copies of what had already been filed in Wyoming. On the other hand, Utah's position has been that Montana water officials in effect treated Utah's original filing in Montana as defective and took the necessary steps to see that corrections were made in the time provided for under the Montana statute (*cf.*, *e.g.*, Utah's October 26, 1981, Brief, *supra* n.4, at pp. 1-21, with *id.* at pp. 22-29). These conflicting arguments illustrate the problem

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[23] *E.g.*, Utah's June 11, 1975, Reply, *supra* n. 20, at p. 14.

[24] Wyoming can, of course, make sure that Montana appropriators will not injure Wyoming appropriators, but once that decision is reached, Montana law governs as to how its 58% allocation can be appropriated, if at all.

[25] In this respect, it is noteworthy that under Article I(A) of the Compact, all entities and individuals, including corporations, which use, claim, or in any manner assert any right to the use of the waters of the Yellowstone River Basin under the authority of the signatory States are to be treated as States under the Compact (App. 61a) (see Utah's October 16, 1975, Memo, *supra* n. 12, at pp. 11, 13).

Respondents have had in attempting to interpret the Compact.

Despite the obvious need to deal in some fashion with Article XVIII, and despite Respondents' initial feeling that the Compact was not entirely clear (see *supra* n.10), the Montana Supreme Court has approached the problem here in a singularly simplistic way, by ignoring Article XVIII and relying upon one sentence in Article VII(C). This is the same court which had previously noted: "It often happens that the chief value of an appropriation consists in its priority over other appropriations in the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right." *General Agriculture Corp.* v. *Moore*, 166 Mont. 510, 534 P.2d 859, 863 (1975).

Despite this clear recognition of the important rights involved here, the Montana Supreme Court definitively ruled upon the Yellowstone River Compact without Petitioner ever having received an evidentiary hearing. No evidence has been presented or received by any court, and many of the allegations in Petitioner's Amended Affidavit which were supposed to have been taken as true have been ignored or in effect rebutted by conclusions in the rulings below. The net result is that despite Petitioners' repeated protests against violations of its procedural and substantive rights (*supra* n.14), the Compact has now been interpreted in a way that forecloses any further action on Petitioner's part if a permit issues on Utah's application. The State District Court judgment that purported to leave open any remedy available to Petitioner except mandamus has been followed by a decision of the State's highest court which cuts off all such remedies. No matter what Petitioner now chooses to allege in State court, it will be met by the holding that the Montana water officials did precisely what the Compact required them to do.

We respectfully submit that no matter which party to this litigation is correct in its attempt to reconcile the

various provisions of the Compact, this Court should have the final word in the matter. Otherwise, Article XVIII, with its new and important language in regard to water rights, will go uninterpreted, and Western States in the future will be at a loss as to whether or not they can safely include such language in their interstate compacts.

As to Montana, we are confident that once that State is made to understand by this Court that the Yellowstone River Compact does not *require* the retroactive application by Montana of Wyoming's priority dates, Montana will proceed to apply its own "first in time, first in right" law of priorities, and Petitioner's September 27, 1974, date will then prevail.

CONCLUSION

For all of the reasons outlined above, we urge the Court to grant certiorari, to interpret the controlling provisions of the Yellowstone River Compact, and to reverse the decision and judgment of the Montana Supreme Court.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR., ESQUIRE *
LEE LOEVINGER, P.C.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

HENRY LOBLE, ESQUIRE
PETER C. PAULY, ESQUIRE
LOBLE & PAULY, P.C.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601
(406) 442-0070

BOYD L. HENDERSON, ESQUIRE
Associate General Counsel
Tennessee Gas Transmission
Tenneco Building
P. O. Box 2511
Houston, Texas 77001
(713) 757-3078

* *Counsel of Record*

Counsel for Petitioner

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

82-237

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner

v.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL, INC.,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

E. BARRETT PRETTYMAN, JR., ESQUIRE *
LEE LOEVINGER, P.C.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

HENRY LOBLE, ESQUIRE
PETER C. PAULY, ESQUIRE
LOBLE & PAULY, P.C.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601
(406) 442-0070

BOYD L. HENDERSON, ESQUIRE
Associate General Counsel
Tennessee Gas Transmission
Tenneco Building
P. O. Box 2511
Houston, Texas 77001
(713) 757-3078

* *Counsel of Record*
Counsel for Petitioner

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APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 38781

STATE EX REL. INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff and Relator,

-vs-

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and JOSEPH W. SABOL, WILSON F. CLARK, DAVID G. DRUM, CECIL WEEDING, DEAN HANSON, VIOLA HERAK, and WILLIAM H. BERTSCHE, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; GARY J. WICKS, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; and UTAH INTERNATIONAL, INCORPORATED, a Delaware corporation,
Defendants and Respondents.

ORDER STAYING PROCEEDINGS

It appears to the satisfaction of the above-entitled court in the above-entitled action, the Honorable Jack D. Shanstrom, District Judge presiding, that one of the defendants herein, Utah International Incorporated, a Delaware corporation, has filed an action in the United States

District Court for the District of Montana—Billings Division, Civil Docket No. CV-75-108-BLG, entitled "Utah International Incorporated, a Delaware corporation, Plaintiff, vs. Intake Water Company, a Delaware corporation, Defendant". Upon representations of counsel for the plaintiff herein, Intake Water Company, a Delaware corporation, that they intend to file preliminary motions directed to the complaint on file in said federal district court action, on behalf of Intake Water Company, as defendant therein, and good cause appearing therefor;

IT IS HEREBY ORDERED that all proceedings herein are hereby stayed, including any requirement that Intake Water Company, a Delaware Corporation, as plaintiff herein, file any brief in answer and opposition to any of the briefs of the defendants herein in support of the defendants' respective motions to quash and motions to dismiss the Amended Affidavit and Application for Writ of Mandate on file herein and any requirement that the said Intake Water Company file Answers or Objections to the Interrogatories propounded to Intake Water Company by Utah International Incorporated herein, pending a ruling of said federal district court on the preliminary motions to be filed in said federal district court action by Intake Water Company, a Delaware corporation, as the defendant therein, directed to the complaint on file therein.

DATED this 15th day of December, 1975.

/s/ Jack D. Shanstrom
JACK D. SHANSTROM
Presiding Judge

APPENDIX B

UNITED STATES DISTRICT COURT
D. MONTANA
BILLINGS DIVISION

No. CV-75-108-BLG

UTAH INTERNATIONAL INCORPORATED,
a Delaware Corporation,
Plaintiff,

v.

INTAKE WATER COMPANY,
a Delaware Corporation,
Defendant,

and

STATE OF WYOMING; and OFFICE OF STATE ENGINEER OF THE STATE OF WYOMING,
Applicants for Intervention,

and

STATE OF MONTANA, BY and THROUGH THE DEPARTMENT OF NATURAL RESOURCES and CONSERVATION,
Applicants for Intervention.

Dec. 5, 1979

MEMORANDUM AND ORDER

BATTIN, Chief Judge.

This declaratory judgment action has arisen from the competing efforts of Utah International Incorporated, hereinafter "plaintiff", and Intake Water Company, hereinafter "defendant", to acquire appropriative rights in certain waters allocated to the State of Montana under

the terms of the Yellowstone River Compact. The facts upon which this action is based are fairly simple.

On November 20, 1973, plaintiff filed three applications for permits to appropriate surface water with the Office of the State Engineer of the State of Wyoming. By these applications, plaintiff sought to appropriate certain waters of the Powder River, a tributary of the Yellowstone River, in Campbell County, Wyoming, for diversion, impoundment and storage in Wyoming and ultimate transportation to and use in the State of Montana.

On December 4, 1973, duplicate copies of plaintiff's applications as originally filed in the Wyoming State Engineer's office were transmitted to the Montana Department of Natural Resources and Conservation, in partial compliance with the terms of Article VII(B) of the Yellowstone River Compact (hereinafter "Compact"). The applications so transmitted to the Department of Natural Resources were not accompanied by the required filing fee.

Substantial changes were made to the contents of plaintiff's applications as originally filed in the Wyoming State Engineer's office before they were finally accepted for filing in Wyoming. Duplicate copies of plaintiff's applications as finally accepted for filing in Wyoming were never transmitted to or filed with the Montana Department of Natural Resources.

There is no question but that the waters sought to be appropriated by the plaintiff under its applications are waters allocated to Montana under the terms of the Compact. On February 27, 1974, Richard T. Munger, Chief of the Water Rights Bureau of the Department of Natural Resources, advised the plaintiff by letter that ". . . it is the position of the Department that any applicant proposing use of water in Montana with intent to count that use against Montana's allocation under the Yellowstone River Compact must apply for a permit pursuant to the Montana Water Use Act . . . ."

On September 27, 1974, defendant filed an application for beneficial water use permit with the Water Resources Division of the Montana Department of Natural Resources and Conservation, and an application for permit to appropriate surface water with the Office of the State Engineer of the State of Wyoming. By such applications, the defendant sought to appropriate certain waters of the Powder River for impoundment and storage in a reservoir located in the states of Montana and Wyoming pending ultimate sale and use in the states of Montana and Wyoming. The defendant has contended, and the contention stands unrebutted, that its filings in both Montana and Wyoming were proper in form, accompanied by the required filing fees, and followed by the required cross-filings of duplicate applications.

On January 14, 1975, the plaintiff filed its Application for Beneficial Water Use Permit with the Montana Department of Natural Resources and Conservation. The application was for the purpose of appropriating "presently unused and unappropriated waters of the Powder River allocated to the State of Montana for beneficial use pursuant to Article V(B)(4)(a) of the Yellowstone River Compact, 1950." The pleadings show that plaintiff's January 1975 application was filed in proper form, and accompanied by the required filing fee.

On January 14, 1975, the Montana Department of Natural Resources and Conservation assigned a priority date of November 20, 1973, to plaintiff's January 1975 application. The defendant excepted to this action by the Department of Natural Resources, and demanded, both orally and in writing, that the Department amend its records to show a priority date of January 14, 1975, on plaintiff's application. Upon the Department's refusal to assign a later priority date to the plaintiff, the defendant initiated a mandamus proceeding in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark. By its man-

damus proceeding, the Defendant sought to compel the Department to issue a priority date to the plaintiff in accordance with what it deemed to be the controlling Montana law. At issue in that proceeding, as nearly as may be discerned from the briefs in this case, is the question of whether the Department of Natural Resources and Conservation is authorized to assign priority dates to applications other than in accordance with the Montana Water Use Act of 1973, and whether the priority date issued by the Department in this case was issued in conformity with the Montana Water Use Act.

Subsequent to Intake's filing the state court action, Utah International filed the instant declaratory judgment action. By this action, Utah has asked this Court to adjudicate and declare the rights of both parties to the Yellowstone River Compact waters sought to be appropriated, to approve the November 29, 1973, priority date accorded to the plaintiff's applications by both the State of Wyoming and the State of Montana, to declare that the State of Montana has no jurisdiction to adjudicate the priority of Compact waters for which a diversion point in Wyoming is proposed, and to declare that Wyoming has exclusive jurisdiction to adjudicate the priority of plaintiff's applications, which adjudication is binding upon and must be enforced by the State of Montana.

This case is presently before the Court on motions filed by both parties. The defendant has moved to dismiss for want of subject matter jurisdiction, to dismiss for failure to state a claim, to stay all proceedings in this case pending a determination on the merits of defendant's State mandamus proceeding, to abstain from the exercise of jurisdiction, and to certify to the Supreme Court of the State of Montana a controlling question of Montana law. The plaintiff has moved for summary judgment on its complaint. All motions have been fully briefed and argued.

The Court, having reviewed the positions of the parties and the supporting memoranda, finds itself in an unusual position. It cannot be doubted that water is one of the arid West's most precious resources. Similarly, it cannot be doubted that, because of water's value, a dispute over the right to possession of water is hard-fought. This case is no exception. The anomaly facing the Court in resolving this contest is that the position of neither party can be wholly sustained. The parties to this litigation perceive the issues differently from one another, and perceive different elements in the litigation to be controlling. Because the issues before the Court are somewhat elusively framed, the most reasonable first step toward resolution of the pending motions is deemed to be a definition of this Court's jurisdiction.

In its complaint, the plaintiff predicated jurisdiction upon 28 U.S.C. § 1331(a) and 28 U.S.C. § 2201. Section 1331(a), the general federal question provision, states that:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

Section 2201 states that:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The plaintiff has advanced the proposition that, under the jurisdictional statutes cited in its complaint as well

as the controlling case law, this Court not only has original jurisdiction to fully construe the Compact and grant the declaratory relief requested, but also has the exclusive jurisdiction to so do. The fundamental premise of plaintiff's position is that interstate compacts must be construed in light of federal common law, regardless of any state constitutional or statutory provisions. The authority upon which the plaintiff advances its position consists of two cases, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), and *Dyer v. Sims*, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951). Each of the cases cited by the plaintiff discusses the task of judicially construing the intention of states signatory to an interstate compact in instances where the states' intention is the subject matter of litigation, and further discusses the uniquely federal character of that task.

> The construction of a compact sanctioned by Congress in Art. I § 10 cl. 3 of the Constitution presents the federal question. *Delaware River Joint Toll Bridge Comm. v. Colburn*, *supra*, [310 U.S. 419 at 427, 60 S.Ct. 1039 at 1040, 84 L.Ed. 1287]. Moreover, the meaning of the compact is a question over which this Court has the final say.
>
> *Petty*, 359 U.S. at 278, 79 S.Ct. at 788. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between states, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. La Plata Co.*, 304 U.S. 92, 110 [58 S.Ct. 803, 811, 82 L.Ed. 1202]),

> is the function and duty of the Supreme Court of the Nation.
>
> *Dyer v. Sims*, 341 U.S. at 28, 71 S.Ct. at 560.

Additionally, the plaintiff has cited *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (9th Cir. 1974). That case involved an action for declaratory and injunctive relief, in which the plaintiff alleged a failure to comply with the requirements of a congressionally sanctioned interstate compact regarding protection of natural resources of a certain area. The district court dismissed the action for want of subject-matter jurisdiction, and the plaintiffs appealed. The issue before the Court of Appeals was one of first impression: whether a federal court has original jurisdiction over a suit involving construction of an interstate compact as one arising under the Constitution, laws or treaties of the United States. The Court of Appeals found that a federal court does have original jurisdiction over a suit in which the construction of a congressionally sanctioned interstate compact is considered, on the basis that congressional consent transforms the compact into a law of the United States.

> For this case to be within the purview of § 1331 (a), a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's claim. The gravamen of the complaint is the alleged failure of the TRPA to comply with the requirements of the Compact in various particulars. To determine the nature and scope of these requirements requires a construction of the Compact. Such construction, therefore, forms an essential element of the complaint. Thus, if the Compact can properly be characterized as a "law" of the United States, then federal jurisdiction is established.
>
> *League*, 507 F.2d at 519.

In *League*, the Ninth Circuit cited *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), for the proposition that a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's claim in order to obtain § 1331(a) jurisdiction. In conjunction with *Gully*, the Ninth Circuit cited *Delaware River Comm'n v. Colburn*, 310 U.S. 419, 60 S.Ct. 1039, 84 L.Ed. 1287 (1940), in which the Supreme Court stated, in essence, that the construction of the bi-state compact sanctioned by Congress by virtue of Article I, Section 10, Clause 3, of the Constitution, involves a federal title, right, privilege, or immunity which, when specially set up or claimed in a state court may be reviewed in the Supreme Court on *certiorari* under § 237(b) of the Judicial Code. The implication of the Ninth Circuit's citation of the *Colburn* case is, of course, that the task of construing the Compact urged by the parties in this case is cognizable in this Court, insofar as construction of the Compact in issue would implicate a federal right, title, privilege, or immunity, which, as both *Gully* and *League* have instructed us, is an essential element for bringing such a claim within the purview of § 1331(a).

> While the court in *Colburn* felt it unnecessary to clearly articulate the basic premise of its decision, we conclude after careful investigation that the result there was based on the implicit finding that the interstate compact involved was a "statute of the United States" within the meaning of 28 U.S.C. § 1257(3). Neither logic nor policy justifies a different interpretation of the substantially similar language in 28 U.S.C. § 1331(a). Therefore, a case involving the construction of an interstate compact which requires a judicial determination of the nature and scope of obligations set forth therein "arises" under the "laws of the United States within the meaning of § 1331(a)."

League, 507 F.2d at 521.

While the plaintiff has firmly established that an interstate compact approved by Congress is, upon Congressional approval, a "law of the United States", and that this Court is empowered, under § 1331(a) to construe such compact, the plaintiff has also advanced its argument one step further. The plaintiff has argued that ". . . the question of interpretation presented by any interstate compact was not up to a state but was rather a purely federal question . . . ." The plaintiff further argues that, ". . . from the teaching of *Petty*, *supra*, *Dyer v. Sims*, *supra*, and *Hinderlider*, *supra*, [we know] that states do not have the power to unilaterally emasculate any of the Compact provisions or to burden the Compact with a state law or a state interpretation . . .", and further yet, that:

> *League*, supra, teaches us that a compact is a special federal law which only a [sic] United States Supreme Court (or, as in this case, an inferior federal court) has the exclusive power to finally construe and enforce.

Finally, the plaintiff asserts that:

> In substance, the Compact is a special federal act which vests special, exclusive jurisdiction over Compact construction, breaches or enforcement questions in federal courts. Therefore, not only is the question of partial summary judgment exclusively federal, the State of Montana does not even have jurisdiction to decide it.

The substance of plaintiff's argument is that the only forum in which the issues between these parties may be adjudicated is the federal forum. The plaintiff bottoms its position on Article XIII of the Yellowstone River Compact (M.C.A. 85-20-101) which states that:

> Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, in any

> federal court or the United States supreme court [sic], for the protection of any right under this compact or the enforcement of any of its provisions.

It is plaintiff's position that the signatory states have provided for lower federal court jurisdiction concurrent with that of the Supreme Court by virtue of Article XIII, and that the federal jurisdiction is exclusive. Plaintiff's argument does not, however, bear scrutiny, for its reasoning is fraught with the failure to fully understand and incorporate the terms of the Compact and its further failure to square its reasoning with the authorities it has cited as supporting its position.

Article I(1) of the Compact states:

> Where the name of a state is used in this compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said state.

In light of the language in Article I(1) of the Compact, the most pointed failure of the plaintiff's logic lies in its equation of private parties with states for the purpose of litigation. The mere inclusion of all individuals, entities and instrumentalities existing in a signatory state under the name of that state for the purpose of linguistic simplification of the Compact does not place those lesser entities on equal footing with the states. Although the plaintiff would have this Court so rule, this is not a suit between two states signatory to the Compact. It is a suit between private enterprises whose right to appropriate water is derived from the signatory states. That mere

derivation of right does not cause the jurisdiction of this Court or any other federal court to be exclusive in nature. The priorities here in issue, and even the terms of the Compact itself, are susceptible of interpretation by a state court of competent jurisdiction. In such instances, because the Compact is a federal law, and because the judgment of a state court implicates or construes a federal law, the Supreme Court remains as the final arbiter of any federal questions therein raised; but by no stretch of logic does the Supreme Court's *certiorari* jurisdiction over judgments of the highest court of a state equate with the exclusive jurisdiction that the plaintiff would, by its argument, manufacture.

Looking more closely at plaintiff's supporting authorities, further logical failure in plaintiff's argument surfaces. *Dyer v. Sims*, *supra*, a case relied upon heavily by the plaintiff for the proposition that federal jurisdiction over interstate compacts is exclusive, originally arose in the West Virginia courts and was before the Supreme Court on *certiorari* to the West Virginia Supreme Court of Appeals. Plaintiff's argument in support of exclusive federal jurisdiction cannot stand in light of the fact that an interstate compact dispute, as was *Dyer*, arose in the courts of a state and, on *certiorari*, was *remanded* to the state court for further proceedings. Such action by the Supreme Court certainly would not be consistent with the proposition of exclusive federal jurisdiction for which the plaintiff has cited the case. Rather, *Dyer* stands for the more reasoned and legally consistent proposition that the jurisdiction of federal and state courts to construe interstate compacts—or any other federal law—when the parties are individuals, is concurrent. The Supreme Court then sits, by virtue of its *certiorari* jurisdiction, as the final arbiter of federal law. It is evident, then, that plaintiff's contention that this Court is obligated to determine each of the issues between the parties to this action, insofar as it is the only Court capable of assuming and exercising jurisdiction, must be rejected.

This Court does, however, recognize its jurisdiction under § 1331(a), concurrent with that of the State of Montana, to construe the terms of the Compact. However, merely because this Court has § 1331(a) jurisdiction to determine certain of the issues before it does not oblige it to determine all of the issues before it. It must be borne in mind that, in concert with § 1331(a), plaintiff has predicated this Court's jurisdiction upon § 2201, the declaratory judgment statute. Insofar as the relief sought by the plaintiff in this action is declaratory in character, the Court must regulate the exercise of its jurisdiction by reference to § 2201.

It has long been held that a federal court's exercise of jurisdiction under § 2201 is discretionary.

> The Declaratory Judgment Act of 1934, now 28 U.S.C. § 2201, styled "creation of a remedy", provides that in a case of actual controversy, a competent court may "declare the rights and other legal relations" of a party "whether or not further relief is or could be sought." This is an enabling act, which confers a discretion upon the courts rather than an absolute right upon the litigant.
>
> *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241, 73 S.Ct. 236, 239, 97 L.Ed. 291 (1952).

Because this Court's jurisdiction under § 2201 is discretionary, the exercise of that jurisdiction must be attended by a careful weighing of the effects of that exercise, giving due consideration, in this case, to the pending litigation in the Montana State District Court. Again, *Public Service Comm'n v. Wycoff*, *supra*, provides guidance in assuming declaratory jurisdiction.

> But when all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness in-

formed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case.

Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful that a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth the claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Public Service Comm'n, 344 U.S. at 248, 73 S.Ct. at 242-243.

In weighing all of the facts and circumstances in this case, I find that declaratory judgment may properly issue to the extent of construing certain disputed terms of the Compact, but that, as to all other issues raised by the parties, deference to the action presently pending in the Montana State District Court is proper.

The disputed provisions of the Compact requiring reconciliation are Articles VII and XVIII. In pertinent part, Article VII provides:

> (2) Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.
>
> (3) Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

Article XVIII provides:

> No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact.

It is the plaintiff's contention that the terms of the Compact give Wyoming exclusive jurisdiction to determine the priority date of waters diverted within the state of Wyoming, even if for use in another signatory state. The effect of this argument is, of course, to affirm the present date of priority enjoyed by the plaintiff. It is the defendant's contention that Wyoming cannot accord a priority date to waters which are to be charged against Montana's allocation under the Compact, and that Article XVIII vests in each signatory state the "final say" as to

both the priority of appropriative right and the use to which Compact water charged to its allocation will be designated. Both the plaintiff and the defendant have strained the terms of the Compact in an effort to achieve the end most beneficial to their respective positions, and have, in so doing, postulated that Articles VII and XVIII are inconsistent. I disagree.

To begin with, each article of the Compact is presumptively consistent with the body of the Compact as a whole, and is entitled to its presumptive validity and consistency until it is otherwise clearly shown. Beyond that basic tenet of statutory construction, it is further to be presumed that each article of the Compact was crafted by its drafters to serve a specific purpose; it is the obligation of this Court to give effect to that purpose.

From the terms of Article VII it can clearly be seen that the Compact contemplates and has provided for appropriations involving diversion in one signatory state and use in another.

> Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion of all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority.

It can also clearly be seen in Article XVIII that the drafters intended that the Compact not operate in derogation of the sovereignty of any signatory state.

Reconcilation of these Compact provisions can be achieved through attention to the language of Article VII. As a fundamental matter, Article VII(2) contemplates that the appropriation of Compact waters which entails diversion in one signatory state and use in another occur as an operation of the joint sovereignty of the states involved. The provision for cross-filing in each state indicates that the law of each sovereign is implicated in determining the issues surrounding a given ap-

propriation. Article VII(3) contemplates that any adjudication of a water right deriving from more than one sovereign be conducted in conformity with and according to the law of the state in which the water is diverted. It is not, under the provisions of VII(3), mandated that such adjudication be had in the courts of the state where the water is diverted. Rather, the choice of forum is permissive within the Article. "Appropriations *may* hereafter be adjudicated in the state in which the water is diverted . . . ." (Emphasis added.) Only choice of law is governed by Article VII(3). It is further provided, in keeping with the theme of joint operation of sovereignty evident in the Compact, that an adjudication of water diverted in one state, although conducted in conformity with the state of diversion, must be confirmed by the appropriate authority in the state of use. Implicit in this scheme is the assumption that each sovereign in a multi-sovereign appropriation has authority over every aspect of the appropriation, from priority date to definition of the beneficial use to which the water is put. Although no sovereign's authority can extend beyond its territorial boundaries, the requirement of confirmation of any multi-state adjudication provides an internal check on an adjudication conducted in a state of diversion on those aspects of the adjudication affecting the state of use. Thus, the Compact can be seen to contemplate a vehicle for maintaining consistency in the adjudication of Compact waters by providing a framework for two or more states to strike an agreement on any given multi-state appropriation. When an adjudication is in such a form as is acceptable to all states involved, a permit may be issued and water rights established in conformity with both the law and the overall water use policy of the states.

Translated to the facts of this case, the foregoing construction imports that Wyoming does not, as the plaintiff has argued, have the sole jurisdiction to adjudicate the water right in issue. Although Wyoming is the

state of diversion for the appropriation sought by both parties, thus mandating the application of Wyoming law in any adjudication, the action is equally cognizable in either Wyoming or Montana. As the Montana State District Court presently has such an action before it, the greater wisdom lies in permitting that action to proceed to its conclusion. The Montana courts are perfectly able to apply the law of Wyoming in the course of such proceedings. As an additional benefit, the Montana forum also will have before it previously unconsidered questions of state law which control the application of the Montana Water Use Act to Yellowstone River Compact waters. A Montana State District Court adjudication of the water right in dispute would also, it seems, serve as the confirmation required by the Compact, resulting in an economical use of judicial resources. By proceeding in the manner outlined above, the terms of the Compact are satisfied. The joint sovereignty of Montana and Wyoming over the Compact waters in issue is recognized and permitted the leeway essential to its proper function, while at no time divesting or impinging upon either state's sovereign control over those waters found within its boundaries.

As previously stated, I find that, except for those Articles of the Compact discussed above, the issues raised in this case are more properly considered by the Montana State District Court. As previously noted, this Court's declaratory jurisdiction is discretionary, not mandatory. In declining to exercise jurisdiction in this case, I rely upon the permissive character of § 2201 and the doctrine of abstention as recently defined by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In that case, the United States brought suit in its own behalf and on behalf of two Indian tribes, seeking a declaration of its rights to waters in certain rivers and their tributaries in Colorado. The United States District Court for the District of Colorado granted a motion to

dismiss, stating that the doctrine of abstention required deference to proceedings filed before the Colorado water rights adjudication court. The Court of Appeals reversed the District Court, but, on *certiorari*, was itself reversed.

In holding that the District Court's dismissal of the action was proper, although on grounds other than abstention, the Supreme Court discussed the application of the doctrine of abstention in some detail. That discussion is directly applicable to the case presently before this Court.

Quoting from *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1950), the Court stated that:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

In defining those classes of cases in which the abstention doctrine is properly invoked, the Court stated that

> [a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . . . In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Colorado River Water Conservation District v. United States, 424 U.S. at 814, 96 S.Ct. at 1244, 1245.

The case presently before the Court is such as was described by the Supreme Court in *Colorado River* as being proper for abstention. The law of the State of Montana concerning the effect of the Yellowstone River Compact upon the terms of the Montana Water Use Act, and the manner by which Compact appropriations are to be managed under the Water Use Act is unsettled. This Court's efforts to discover any previous consideration by the Montana Court of questions such as these has been fruitless. Because the law of Montana is unsettled in this area, a decision of the claims which implicate Montana law stands to greatly impair efforts of the State of Montana to implement state policy in administering Compact waters. Indeed, decision by this Court of the claims presently before it may operate to the derogation of all parties to the Compact, in their efforts to effect policy respecting the allocation of state waters. Because, then, a decision by this Court upon the issues presently before it reasonably stands to retard rather than advance the purpose of mutual determination of the proper allocation of interstate waters and, further, would greatly infringe upon the interest, which is uniquely Montana's, of effectuating its policy for administering Compact waters, this Court finds that it must abstain from the exercise of its jurisdiction in this case, and, further, that this cause should proceed in the courts of the State of Montana.

Therefore, upon the basis of the foregoing,

IT IS ORDERED that the motion to dismiss for want of subject matter jurisdiction be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the motion to dismiss for failure to state a claim be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the motion for stay of all proceedings herein pending determination of the action presently pending in the Montana State District Court be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the motion for certification of a question of state law to the Supreme Court of the State of Montana be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the motion for abstention and referral of this cause to the Montana State District Court be, and the same hereby is, granted.

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 38781

STATE EX REL. INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff and Relator

—VS—

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA AND JOSEPH W. SABOL, WILSON F. CLARK, DAVID G. DRUM, CECIL WEEDING, DEAN HANSON, VIOLA HERAK, and WILLIAM H. BERTSCHE, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; GARY J. WICKS, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; and UTAH INTERNATIONAL, INCORPORATED, a Delaware corporation,
Defendants and Respondents.

ORDER DISSOLVING STAY OF PROCEEDINGS

This Court having read the Motion for Order Dissolving Stay of Proceedings on file herein of plaintiff and relator, Intake Water Company, a Delaware corporation, and this Court now being advised in the premises,

IT IS HEREBY ORDERED as follows:

(1) The Order Staying Proceedings herein of December 15, 1975, be, and is hereby, dissolved;

(2) The plaintiff and relator, Intake Water Company, a Delaware corporation, is granted thirty (30) days from and after the date of this Order to respond to the interrogatories and request for production of documents propounded on behalf of the defendant and respondent, Utah International, Incorporated;

(3) The plaintiff and relator, Intake Water Company, a Delaware corporation, is granted forty (40) days from and after the date of this order in which to serve and file a brief in answer and opposition to the briefs of the defendants and respondents in support of their respective Motions to Quash and Motions to Dismiss the Amended Affidavit and Application for Writ of Mandate on file herein; and

(4) The defendants and respondents herein are granted twenty (20) days from and after the date of service of the brief of the plaintiff and relator herein, Intake Water Company, a Delaware corporation, in which to serve and file a brief in reply thereto.

Done and Dated this 8th day of January, 1980.

/s/ Jack D. Shanstrom
JACK D. SHANSTROM
District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 38781

STATE EX REL. INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff and Relator

—VS—

BOARD OF NATURAL RESOURES and CONSERVATION OF THE STATE OF MONTANA and JOSEPH W. SABOL, WILSON F. CLARK, DAVID G. DRUM, CECIL WEEDING, DEAN HANSON, VIOLA HERAK, and WILLIAM H. BERTSCHE, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; GARY J. WICKS, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; and UTAH INTERNATIONAL, INCORPORATED, a Delaware corporation,
Defendants and Respondents.

ORDER QUASHING AND DISMISSING INTAKE'S AMENDED AFFIDAVIT AND APPLICATION FOR WRIT OF MANDATE

INTRODUCTION

On or about August 18, 1975, Intake Water Company ("Intake") filed its amended affidavit and application for writ of mandate requesting this Court to compel the Department of Natural Resources and Conservation, et al., (hereafter DNRC) to expunge the priority date of No-

vember 20, 1973, which DNRC had allocated to Utah International's (hereafter Utah) application to appropriate water under the Yellowstone River Compact and instead allocate to that application a priority date of January 14, 1975. Both DNRC and Utah filed motions to quash and dismiss upon the grounds the amended affidavit failed to state facts sufficient to constitute a proper case for the issuance of a writ of mandate; that Intake had an adequate remedy at law which precludes it from requesting mandamus; that Intake had not exhausted administrative remedies which were available to it as a condition precedent to any action at law or equity; and that the amended affidavit failed to state facts sufficient to constitute a claim for relief and should be dismissed.

This Court ordered oral argument on Respondent's motion to quash and dismiss for December 11, 1980. All parties were also given the opportunity to file supplementary memoranda up to and including the date of argument. Utah exercised this right by filing a supplementary memorandum. Intake requested and was granted additional time within which to respond. Oral arguments were advanced in support of the motions to quash by DNRC and Utah through their respective counsel, Donald D. MacIntyre, Ronda L. Sandquist, and Urban L. Roth, and by Peter Pauly and Henry Loble, Jr., on behalf of Intake. Thereafter, the Court requested counsel to prepare a proposed order and to supply the Court with any supplementary memoranda on or before December 31, 1980, at which time the matter would be deemed submitted. Now the Court, being fully advised in the premises, enters its order quashing and dismissing the amended affidavit with prejudice. This order of dismissal is supported by the Court's opinion which follows.

THE PLEADINGS

The Respondents' motions to dismiss and to quash were directed to Intake's amended affidavit and the legal sufficiency of that affidavit. Therefore, in determining

whether or not Intake, has stated a claim for relief for mandamus, the Court must undertake an analysis of the amended affidavit to ascertain whether or not under applicable law, Intake has stated a legally sufficient claim for relief.

Intake alleges that on November 20, 1973, Utah filed three applications for permits to appropriate surface water with the Wyoming State Engineer's Office. Copies of those applications were attached as exhibits to Intake's affidavit. The information contained in those applications includes, *inter alia*, the following: The name and address of the applicant; the use to which water will be put; the source of the appropriation; the point of diversion; the carrying capacity of the diversion facility; the fact that appropriation is being made pursuant to Article VII(B) of the Yellowstone River Company [Compact]; and a general description of the project. Duplicates of those applications were transmitted to DNRC on December 4, 1973.[1]

On December 27, 1974, Intake filed its application to appropriate water under Yellowstone River Compact on

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[1] Although Intake alleges that there were changes made in the applications originally filed with the Wyoming State Engineer's office and that duplicate copies of those application [sic] as finally accepted by Wyoming State Engineer's office were never filed with or transmitted to DNRC there is no indication that Wyoming, because of those changes, changed the priority date from the filing date of November 20, 1973. Moreover, Article VII (B) of the Yellowstone River Compact requires that only the initial application be duplicated in the state of use and there is nothing to indicate that further filings need be duplicated in both states. Also, there is nothing in the statutory scheme implementing the Yellowstone River Compact in Montana which would indicate that subsequent filings are required. Moreover, significantly absent from the amended affidavit are any allegations that there was some clear legal duty to make duplicate filings of the changes or that somehow that affected the priority right. There is absolutely no citation to law either in the briefs or in the amended affidavit which would support any such argument.

Form No. 600 with DNRC and also on the Wyoming form with the Wyoming State Engineer's Office. Those applications were accompanied by the required filing fee. Duplicates of both filings were reciprocally made with the other state.

On January 14, 1975, Utah filed with DNRC an application for beneficial use of water on Form No. 600, accompanied with a filing fee in the amount of $100.00. It is noteworthy that Utah's application on Form 600 provided virtually the same information that was contained on the Wyoming forms: The name and address of the applicant, the source of water supply, the point of diversion, a description of the project, capacity of the project, description of proposed beneficial uses, and the place of use.[3] DNRC assigned a priority date of November 20, 1973, to the supplementary filing made by Utah on January 14, 1975.

Intake contends that its filing of September 27, 1974, was first in time and first in right, that at all times DNRC had a clear legal duty, under the Montana Water Use Act, to assign Utah's application a priority date of January 14, 1975, and to assign Intake's application a priority date of September 27, 1974. The thrust of Intake's argument is that DNRC failed to comply with clear legal duties imposed upon it by the Montana Water Use Act and the regulations promulgated pursuant to that act. The statutes relied upon by Intake include Section 82A-1501.1, R.C.M., 1947, which imposes upon DNRC the duty to administer laws, *inter alia*, pertaining to "water rights (Title 89, Chapter 8, now Title 85, Chapter

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[3] Intake at no time has alleged that (1) it did not have notice of Utah's filing; (2) that the information contained in the '73 filing could not be found in the '75 filing; or (3) that Intake was prejudiced by not having available the subsequent information found in the '75 filing in preparing its own application. Obviously, an examination of the two documents would preclude Intake from making any such contention.

2, M.C.A.) and the Yellowstone River Company [Compact] (Title 85, Chapter 20, M.C.A.).

The Montana Water Use Act is the product of a provision of the 1972 Montana Constitution which:

> "requires that the legislature provide for the administration, control and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan." 85-2-101 (2), M.C.A.

Under the Montana Water Use Act, the Department was obligated to "enforce and administer this chapter and rules adopted by the board under 85-2-113" and to prescribe "procedures, forms, and requirements for applications, permits, certificates, declarations, claims of existing rights, in proceedings under this chapter *and prescribe the information to be contained in any application* * * * or other documents to be filed with the Department under this *chapter*." (85-2-112(2)) The Yellowstone River Compact, as noted above, is contained in Chapter 20.[3] In addition, the Department had duties to establish a "centralized records system of all applications." *Id.* (3).

The Board of Natural Resources and Conservation had the power to prescribe fees for the filing of applications "under this chapter." (85-2-113 (1), M.C.A). "This chapter" was again Chapter 2—not Chapter 20 dealing with the Yellowstone River Compact. Pursuant to that authority, a fee of $100.00 was required for Utah's application to be processed.

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[3] The Court will discuss the Montana legislative implementation of the Yellowstone River Compact *infra*.

Section 85-2-301, M.C.A., provides that after July 1, 1973:

> "a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive."

Section 85-2-302, M.C.A., provides that:

> "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution work therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the department within 30 days after its return to the application or within a further time as the department may allow. If an application is not corrected within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 18 months shall be terminated."

Section 85-2-401, M.C.A., provides:

> "as between appropriators, the first in time is the first in right."

* * *

> (2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department * * *."

Again the reference is made to "this chapter" and not Chapter 20 relating to the Yellowstone River Compact.

Relying upon the above-quoted statutes, Intake argues that Utah's 1973 application did not comply with the "exclusive" method of appropriating Montana waters under the Montana Water Use Act in that (1) it was not originally filed on Form No. 600; and (2) it was not accompanied by the requisite fee of $100.00.

The Respondents attack the sufficiency of the affidavit on the grounds that, taken as true, the allegations did not define a "clear legal duty" which would support mandamus.

MANDAMUS: IS IT AN APPROPRIATE REMEDY?

The writ of mandamus may be issued only "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from what which he is unlawfully precluded "by an inferior border person. It may only issue where there is not a plain, speedy, and adequate remedy in the ordinary course of law." 27-26-102, M.C.A.[4]

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[4] Although this court does not reach the issue of whether or not there is a "plain, speedy, and adequate remedy in the ordinary course of law" it is self-evident that under the provisions of the Montana Water Use Act, as implemented by the Montana Administrative Code and Montana Administrative Procedures Act that there are a number of "plain, speedy, and adequate" remedies provided under the Montana Water Use Act itself which, ironically, Intake is predicating its relief upon. See, e.g., 85-2-307, *et seq.*, M.C.A.; 85-2-121; The Uniform Rule, Rules No. 28, *et seq.*, 1-16 (2)-P 6220, Mac.

Although Montana has held that a failure to exercise discretion or an abuse of discretion may form the predicate for a writ of mandamus (See e.g., State ex rel. *Sackman* vs. *State Fish and Game Commission*, 151 Mont. 45 at 52.), Intake has never relied upon such failure or abuse in their affidavit or in argument.

Moreover, it is important to recognize that mandamus is always discretionary. It will not be utilized unless the facts presented to the court are sufficiently compelling to warrant it. State ex rel. *Donavan* vs. *Barrett*, 30 Mont. 203, 205; State ex rel. *Larsen* vs. *District Court*, 78 Mont. 435; *State* vs. *Northern Pacific Railway Co.*, 88 Mont. 529, 550. Furthermore, it is not available where the law permits public officers to exercise discretion and the particular action is within the discretion[5] granted by law. *Lee* vs. *Laitenen*, 152 Mont. 230, 237; State ex rel. *Sackman* vs. *Fish and Game Commission*, *supra.*, at 51-52; State ex rel. *Spear* vs. *Highway Patrol*, 149 Mont. 7, 11.

The issue then becomes whether or not, measured by those standards a clear legal duty emerges from either the provisions of the Yellowstone River Compact or the Montana Water Use Act, which would support mandamus.

THE YELLOWSTONE RIVER COMPACT

The Yellowstone River Compact is a contract between the States of Wyoming, Montana, and North Dakota, sanctioned by Article I, Section 10, Clause 3 of the United States Constitution. It became law on June 2, 1951, after approval by the contracting states and congress. After

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[5] In determining whether or not a clear legal duty was imposed, the courts distinguish between purely ministerial acts and those involving exercises of discretion. *McCarten* vs. *Sanderson*, 111 Mont. 407, 416, 109 P.2d 1108 (1941). Under *McCarten*, an act is ministerial only if it leaves "nothing to the exercise of discretion or judgment."

approval, the Compact became a law of the United States. *Petty* vs. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278 (1959); *Dyer* vs. *Sims*, 341 U.S. 22 (1951); *League to Save Lake Tahoe* vs. *Tahoe Regional Planning Agency*, 507 F.2d 517, at 519-521, cert. denied, 420 U.S. 974 (9th Cir., 1974); *Utah International, Inc.* vs. *Intake Water Company*, 36 St. Rep. 2270, 2274 (D.C. Mont., 1979).

An interstate contract between two sovereigns cannot be impaired by state law. *Green* vs. *Diddle*, 21 U.S. 1 (1823) and may even override state constitutional provisions which conflict with it. *Hinderlider* vs. *LaPlata River and Cherry Creek Ditch Company*, 304 U.S. 92, 106-107 (1938). Nor can the Compact "solemnly entered into between states * * * be unilaterally nulified or given meaning by an organ of one of the contracting states. A state cannot be its own ultimate judge in a controversy with a sister state." *Dyer* vs. *Sims*, 341 U.S. 22, 42 (1951). However, an interstate compact does not prevent one of the contracting states from implementing or aiding the state's administration of the compact as long as such action is in "approbation and not in reprobation of the compact." *Henderson* vs. *Delaware River Joint Toll-bridge Commission*, 362 Penn. 475, 66 A.2d 843, 849 (1949) cert. denied, 338 U.S. 850 (1949).

The purpose of the Yellowstone River Compact was stated in its preamble and was

> "to remove all causes of present and future controversy between said states and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries."

Article I B provided that all persons claiming the right to use Yellowstone River System Waters "shall be subject to the terms of this Compact." Although Article III of the Compact gave the Compact Commission power to formulate rules and regulations common to this court's

knowledge no such rules and regulations have been cited to the court.

The appropriation doctrine was applied to compact waters in Article V, A and B. Of course, a fundamental principle established by the appropriation doctrine is "first in time is first in right."

Article VII A provides the means by which a lower signatory state can acquire the right to appropriate and use water in an upper signatory state." That method is by "compliance with the law of an upper signatory state."

Paragraphs B and C provide:

> "B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.
>
> C. Appropriations may hereafter be adjudicated in the state in which the water is diverted and where a portion or all of the lands irrigated are in another signatory state, such adjudication shall be confirmed in that state by the proper authority. *Ecch adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.*" (Emphasis supplied.)

Although Articles 8 and 9 provide that a lower signatory state may construct water works in an upper signatory state, nevertheless such facilities "shall be subject to the laws of the upper state." In this case the "upper state" is Wyoming. Therefore, all of Utah's diversion and storage facilities, being located in the State of Wyoming, are subject to the laws of the State of Wyoming. The adjudication of Utah's right in Montana is, there-

fore, "to conform" with the laws of the state where the water is diverted—Wyoming. Article 7 C.

Section 41-201, Wyoming Statutes, 1957, provides:

> "Any person, association or corporation hereafter intending to acquire the right to the beneficial use of the public water of the State of Wyoming shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing any work in connection with said construction, or proposed appropriation, make an application to the state engineer for a permit to make such appropriation. Such application must set forth the name and post office address of the applicant, the source of the water supply, the nature of the proposed use, the location and description of the proposed ditch, canal or other work, the time within which it is proposed to begin construction, the time required for completion of construction and the time required for the complete application of the water to the proposed used. * * *"

Section 41-203 provides that all applications

> "shall be recorded in a suitable book kept for that purpose; and it shall be the duty of the state engineer to approve all applications made in proper form, which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights or be otherwise detrimental to the public welfare."

Other statutes relate to requiring additional information, maps, plats, profiles, cross sections, etc. In Section 41-211 it defines final proof of appropriation and the procedure therefor. Finally, in Section 41-212 it states: "The priority of such appropriation shall date from the filing of the application in the engineer's office." Other statutory provisions provide for correction of errors in permits or amending the certificate of appropriation. In

each instance, the date of priority is not affected. Section 41-213 and Section 41-214.

From the allegations of the amended affidavit, it is clear that Wyoming has signed a priority date of November 20, 1973, at 9:00 a.m. to Utah's permit. Under Wyoming law any contrary priority date would be in direct conflict with statutory mandate. Cf. *Wyoming Hereford Ranch* vs. *Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764 (1925). Under Wyoming law, the term "adjudication" means a determination of priorities. See, e.g., *Laramie Irrigation and Power Co.* vs. *Grant*, 13 P.2d 235 (Wyo. 1932). The United States Supreme Court has recognized that water diverted in one state but used in another carries the priority date assigned to it by the state of diversion. See, e.g., *Wieland* vs. *Pioneer Irrigation Co.*, 259 U.S. 498, 501-502; *Mitchell Irr. Dist.* vs. *Sharp*, 121 F.2d 964, 967-968 (10th Cir. 1941) cert. denied, 314 U.S. 667 (1941); *Mitchell Irr. Dist.* vs. *Whiting*, 59 Wyo. 52, 70, 79, 136 P.2d 502 (1943), cert. denied, 322 U.S. 727 (1944); C.F. State ex rel. *Sorensen* vs. *Mitchell Irr. Dist.*, 262 N.W.543 (Neb. 1935), cert. denied, 297 U.S. 723 (1936).

In *Bean* vs. *Morris*, 221 U.S. 485 (1911), Morris, who lived in Wyoming, had appropriated 250 inches from Sage Creek in Montana and sued to enjoin Montana defendants from interfering with his prior right. In confirming Morris' right, Mr. Justice Holmes assumed that:

> "The concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line." 31 S. Ct. at 703.

In deciding that Montana would be presumed to extend comity or recognition to the Wyoming rights, the court said:

"Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that state. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory by the United States.

• • •

The only reasonable presumption is that the state upon their incorporation, continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed." *Id.*, at 704.

In *Wyoming* vs. *Colorado*, 259 U.S. 419, 42 S. Ct. 552 (1922), the Supreme Court decided the respective rights of the litigant states to the waters of the Laramie River. A question of priority between users in both states was involved, and in deciding that question, the court took cognizance of the existence of the prior appropriation doctrine which existed in both states:

"As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried on to completion with reasonable diligence." 42 S. Ct. at 555.

Further the court stated:

"The cardinal rule of the doctrine (of appropriation) is that priority of appropriation gives superi-

> ority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle upon which it proceeds is not less applicable to interstate streams and controversies than to others." 42 S. Ct. at 559.

Finally, with regard to the question of priority, the court said "the rule of priority is regarded in such states as having the same application to a stream flowing from one of them to another that it has to streams wholly within one of them." 42 S. Ct. at 559.

Thus, it is settled federal law (and, of course, the Compact is a federal law) that priority of appropriation is adjudicated or determined by the law of the state of diversion. In this case Wyoming's interest in that right is also significantly affected by the use to which the water is put in Wyoming, e.g., recreation and fishing. (Utah's application attached to the amended affidavit.) Thus, actions of DNRC in assigning the priority date to the applications which had been assigned by Wyoming was clearly in accord with the Compact, Wyoming statutory law, Wyoming case law, and federal law.

Montana has enacted some statutes specifically designed to implement the provisions of the Yellowstone River Compact. See 85-20-102, *et seq.*, M.C.A. The purpose of Chapter 20 "is to provide the means to determine the various appropriative rights to the beneficial uses of water of the interstate tributaries of the Yellowstone River acquired after January 1, 1950 * * *." 85-20-102, M.C.A.

Montana's Legislature has provided the supplementary type of statement which must be filed by a person claiming an appropriative right to use water allocated under the Compact. 85-20-104, M.C.A. That section was amended in 1977 (Section 11, Chapter 460, Montana Session Laws); however, there is no mention of the

Montana Water Use Act. Section 85-20-105, M.C.A., refers to the installation of measuring devices but refers only to Chapter 20 and again that statute was amended subsequent to the enactment of the Montana Water Use Act. (Section 158, Chapter 253, Session Laws 1974.)

By Section 85-20-109 the legislature vested the Board of Natural Resources and Conservation and the Department with the duty to "enforce reasonable rules consistent with this chapter and the Yellowstone River Compact." That section was amended in 1974 also. (Section 160, Chapter 253, Montana Session Laws 1974.) The Legislature even provided a penalty for any person violating or refusing to comply with the provisions of the chapter. 85-20-113, M.C.A.

The Montana legislature was careful to legislate specifically with regard to the Yellowstone River Compact. There was no reference made to the Yellowstone River Compact under the Montana Water Use Act and it was evident that the manner of appropriation was not affected by the Montana Water Use Act until that water came into the State of Montana. In other words, there is absolutely nothing under the Montana Water Use Act which would in anyway derogate from the manner of appropriation outlined in the Yellowstone River Compact.

Legislative history of the Compact also reflects that Article VII B was adopted after the Compact Commission had rejected a proposal which would have vested a state in the position, as is Montana in this case, with authority to condition priority upon compliance with Montana law.

In 1944 the proposed compact provided:

> "Each claim hereafter initiated for an appropriation of water in one signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application including the map showing

the character and location of the proposed facilities and the lands to be irrigated shall be filed in the office of the state engineer of the signatory state in which the water is to be used. If a portion or all of the lands proposed to be reclaimed are located in a state other than the one in which the water is to be diverted, then, *before approval* of the application shall be granted, said *application shall be checked against the records of the appropriate office of the state in which the water is to be used, and a notation shall be placed thereon by the officer in charge of such records to the effect that the land description does not indicate a conflict with existing water rights. All endorsements shall be placed on both the original and duplicate copies of all such maps filed, to the end that the records in both states may be complete and identical.*" (Emphasis supplied.)

Although North Dakota ratified the 1944 draft (Laws 1945, page 460), Wyoming did not. When the 1950 draft of the Compact was approved by all parties, Article VII B had been totally revised and the administrative control over the application process which had appeared in the 1944 draft no longer appeared in the 1950 draft. The authors of the Compact obviously opted for a draft which would not create the administrative bog-down which would be endemic to a two-state approval process. In this instance the intention of the legislator becomes abundantly clear as they rejected the very proposal advanced by Intake in this case.

The legislative de-emphasis of 2-State Control over the application process, together with the jurisdictional mandate set forth in Articles 8 and 9 of the Compact irresistably leads this Court to the conclusion that Article 7 B and C is indeed a choice of law rule which demands that Wyoming law governs the priority of Utah's claim and that Montana must "conform" its adjudication to that law.

However, Intake argues that Article XVIII of the Compact:

> "No sentence, phrase, or clause in this or any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies of (or) officers of such state of the jurisdiction of the water of each state as apportioned in this Compact."

requires that Montana may superimpose upon the Compact all requirements of the Montana Water Use Act. Intake also argues that any contrary interpretation would divest Montana of jurisdiction over its water. As Utah concedes and DNRC contends, there are wide areas of jurisdiction which Montana will exercise over the water once it reaches the State of Montana. See, e.g., 85-2-114, 85-2-124, 85-2-310, 85-2-311, 85-2-312, 85-2-314, 85-2-405, *et seq.*, M.C.A. However, this jurisdiction does not affect the priority date assigned to Utah's application by Wyoming.

Finally, Judge Battin in his decision in *Utah* vs. *Intake Water Company*, *supra*, 36 St. Rep. at 2279, has reached a conclusion directly apposite to this Court's:

> "Translated to the facts of this case, the foregoing construction imports that Wyoming does not, as the Plaintiff has argued, have the sole jurisdiction to adjudicate the water right in issue. *Although Wyoming* as [*sic*] [is] *the state of diversion for the appropriation sought by both parties, thus mandating the application of Wyoming law in any adjudication, the action is equally cognizable* in either Wyoming or Montana. As the Montana State District Court presently has such an action before it, the greater wisdom lies in permitting that action to proceed to its conclusion. *The Montana Courts are perfectly able to apply the law of Wyoming in the course of such proceedings.*" (Emphasis supplied.)

There are no facts alleged in the amended affidavit which, by any fair inference, support a conclusion that Montana has misperceived or misconstrued Wyoming law or that under Wyoming law, there was a "clear legal duty" to assign a different priority date to Utah's application.

THE MONTANA WATER USE ACT

It is argued by Intake, however, that the Montana Water Use Act, provides an exclusive method by which Montana waters are appropriated, and under Article XVIII of the Compact, quoted above, that law renders Utah's 1973 filing void. In that regard, Intake's argument is twofold. First, that the application was not made on the correct form[*] and was not accompanied by the $100.00 filing fee. However, as cited above, the Montana Water Use Act refers to only filings under that chapter; not filings under the Yellowstone River Compact. Moreover, the citations to the statutory implementation of the Yellowstone River Compact by Montana's legislature clearly imply that the legislature has considered the Compact an independent piece of legislation not subservient to the Montana Water Use Act. Indeed, it is a *sui generis* piece of legislation which requires independent implementation.

However, Intake's argument must also fail because it is fundamentally unsound. DNRC had no "clear legal duty" to reject Utah's application of November 20, 1973, as inadequate; rather, the Montana Water Use Act itself vests the department with broad discretion to accept that filing as substantive compliance with the Montana Water Use Act and to assign it a priority date of November 20, 1973. If any deficiencies were evidenced in the application, DNRC had the discretion to extend Utah a further period of 18 months to correct those deficiencies without

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[*] It's interesting that DNRC stamped Utah's Montana filing with "Form 600" and accepted it as tantamount to a filing on Form 600.

losing its priority. (85-2-302, M.C.A., and 85-2-401(2), M.C.A.) In effect, Montana, just as Wyoming, has codified the doctrine of relation back which is a fundamental principle of the appropriation doctrine:

> "The doctrine of relation, or relation back, is important in the appropriation water rights jurisprudence of the West. Its importance lies in its bearing on the priority of an appropriation—its function of holding the claimant's priority intact pending his completion of the appropriative process with due diligence, at which time his priority relates back to the time at which acquisition of the right was initiated." *Hutchins Water Rights In The Nineteen Western States* (1971), pages 382-383.

Montana early adopted the doctrine of relation back. See, e.g., *Murray* vs. *Tingley*, 20 Mont. 260, 268-269, 50 P. 723 (1897). The notice of intention to appropriate water has always been such notice as to put a prudent man upon inquiry. *Hutchins, supra*, at 385; *Kimball* vs. *Gearhard*, 12 Cal. 31 (1859). Utah's filings of the Wyoming forms with all the essential information required under Montana law meets the criteria for adequate notice. Utah was first in time to file its applications and the department correctly applied the doctrine of relation back preserving for Utah its November 20, 1973, priority date. As a matter of fact, if Montana would attempt to confiscate Utah's right acquired by its filings under the Yellowstone River Compact, a very serious constitutional question would be raised. See *Hutchins, supra*, pages 390, 391 and authorities cited.

Intake's argument that the fee was not paid until 1975, must also fail for the same reasons. In essence, the application was complete within the time extended by the department i.e., from November 20, 1973, to January 14, 1975, a period of fifteen months—well within the eighteen months provided by statute. There is absolutely no allegation or assertion that an abuse of discretion was in-

volved and therefore DNRC's actions in allocating to Utah's application a priority date of November 20, 1973, was clearly in accord with the law.

Intake relies, *inter alia*, upon *Kadillak* vs. *The Anaconda Company*, 36 St. Rep. 1820 (1979). In that case the Anaconda Company mining permit application covered only 90 acres while the permit issued by State Lands covered 500 acres. Facially, it did not comply with two other requirements of the Hardrock Mining Act; nevertheless State Lands issued a permit. However, Section 85-2-301 required State Lands to ". . . return any incomplete or inadequate application along with a description of the deficiencies . . ." Section 85-2-301, M.C.A. There is no provision in the Hardrock Mining Act for relation back of the filing date if the application is corrected and completed within eighteen months. Moreover the substantive information supplied in Anaconda's application was facially deficient and rendered the entire application void. As clearly evidenced in the exhibits to Intake's affidavit, Utah's applications on the Wyoming form and on the Montana form are substantively the same. There are no deficiencies nor are deficiencies alleged in the affidavit.

Finally, DNRC's action in assigning to the Utah application a November 20, 1973, priority date is supported by four well-settled principles. The first of these principles is that DNRC's executive construction of the Yellowstone River Compact and the Montana Water Use Act is entitled to great deference by this Court. Both under the Compact and the Water Act, DNRC is vested with wide discretion and has been given the responsibility of construing and administering both laws. In this instance, in construing those laws, they assigned Utah's duplicate Wyoming application a priority date of November 20, 1973. This construction is entitled to "great deference."

> "This court has previously held that in statutory construction problems great deference must be shown

> to the interpretations given to the statute by the agency or officers charged with its administration." *Montana Power Company* vs. *Cremer*, —— Mont. ——, 596 P.2d 483, 485 (1979).

See also *Department of Revenue* vs. *Pugent Sound Power and Light*, —— Mont. ——, 587 P.2d 1282, 1286 (1978); *Northern Cheyenne Tribe* vs. *Hollowbrest*, 425 U.S. 649, 660 (1976); *Skidmore* vs. *Swift & Co.*, 323 U.S. 134, 140 (1944); and *General Electric Co.* vs. *Gilbert*, 429 U.S. 125, 141-142 (1976).

Second, this Court's function is, in the face of a clearly discretionary statute, to ascertain whether or not the agency acted arbitrarily or capriciously. If the agency stayed within statutory bounds, the court's review is ended. *Langen* vs. *Badlands Co Op State Grazing Dist.*, 125 Mont. 302, 308, 234 P.2d 467 (1951). See also State ex rel. *Bailey* vs. *Grandee*, 154 Mont. 437, 445-446, 465 P.2d 334 (1970). This Court has no power to substitute its discretion for that of the agency—a result which Intake is advancing in this case. See, e.g., *Bailey*, *supra*; *IBM* vs. *Lewis and Clark County*, 111 Mont. 384, 387; *State ex rel. Highway Commission* vs. *District Court*, 107 Mont. 126, 130; *Read* v. *Stephens*, 121 Mont. 508, 512, 513.

The third principle which assists the Respondents and this Court in resolving the issue is that only substantial compliance with a statute is required. *Krause* vs. *INA*, 73 Mont. 169, 174, 235 P. 406 (1925); 73 Am. Jur.2d, "Statutes" Section 15. As related above, the Court has compared the contents of Utah's Wyoming application with its Montana application and finds that substantively the same information is included in each filing. Intake has never argued that it didn't have adequate information from Utah's Wyoming filing or that it did not know of that filing. It is patent from a review of the applications themselves that Utah has substantially complied and under Montana and universal rules of statutory con-

struction, substantial compliance is all that is required. Moreover, the Court has reviewed the contents of Intake's filing, attached to the affidavit, and finds that Intake has supplied basically the same type and quantity of information as has Utah in its Wyoming and Montana applications.

Finally, Montana's maxim's of jurisprudence, illustrate the fundamental weakness of Intake's position:

> "Between rights otherwise equal, the earliest is preferred." 1-3-216, M.C.A.
>
> "The law respects form less than substance." 1-3-219, M.C.A.
>
> "The law disregards trifles." 1-3-224, M.C.A.

It is evident that DNRC's acceptance of Utah's Wyoming filing as substantial compliance with the law and as only formalistically defective clearly complies with the maxims of jurisprudence quoted above and that Intake's hypertechnical and formalistic argument flies directly in the face of those maxims.

For all of the foregoing reasons, it is this Court's opinion that Intake has not pleaded a clear legal duty imposed upon any state agency to assign Utah's application a different priority date than it was assigned, namely November 20, 1973. Rather, the action of DNRC is in direct accord with the Yellowstone River Compact, Wyoming law decisions, Montana law decisions, United States Supreme Court decisions, and the Montana Water Use Act. Therefore, Respondents' motions to quash and to dismiss are granted.

DATED this 25th day of Feb., 1981.

/s/ Jack D. Shanstrom
District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 38781

STATE EX REL. INTAKE WATER COMPANY, a Delaware corporation,
Plaintiff and Relator

—VS—

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and JOSEPH W. SABOL, WILSON F. CLARK, DAVID G. DRUM, CECIL WEEDING, DEAN HANSON, VIOLA HERAK, and WILLIAM M. BERTSCHE, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; GARY J. WICKS, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; and UTAH INTERNATIONAL, INCORPORATED, a Delaware corporation,
Defendants and Respondents.

JUDGMENT

Pursuant to the Order and Opinion of this court dated February 25, 1981, and for the reasons therein stated;

IT IS ORDERED, ADJUDGED AND DECREED:

That the Amended Affidavit and Application for Writ of Mandate filed by Intake Water Company on or about

August 18, 1975, and the action instituted by Intake Water Company against the Board of Natural Resources and Conservation of the State of Montana, the Department of Natural Resources and Conservation of the State of Montana, and Utah International, Inc., a Delaware corporation, is hereby dismissed with prejudice as to any further proceedings in the nature of mandamus and without prejudice as to any other remedy that may be available to the plaintiff and relator, Intake Water Company, either at law or in equity, and judgment thereon is awarded to the respondents.

DATED this 16th day of March, 1981.

/s/ Jack D. Shanstrom
District Judge

APPENDIX F

No. 81-209

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

STATE EX REL., INTAKE WATER CO.,
a Delaware Corporation,
Plaintiff and Relator and Appellant,

vs.

BOARD OF NATURAL RESOURCES & CONSERVATION OF THE STATE OF MONTANA ET AL.,
Defendants, Respondents and Respondents,

and

UTAH INTERNATIONAL, INCORPORATED,
a Delaware corporation,
Defendant, Respondent and Respondent.

Appeal from: District Court of the First Judicial District, In and for the County of Lewis and Clark, Honorable Jack Shanstrom, Judge presiding.

Counsel of Record:

For Appellant:

Henry Loble argued and Peter Pauly, argued, Helena, Montana
Loble and Pauly, Helena, Montana

For Respondents:

Donald MacIntyre, Dept. of Natural Resources, argued, Helena, Montana

For Respondent:
Poore, Roth, Robinson, Butte, Montana
Urban L. Roth argued, Butte, Montana.

Submitted: February 26, 1982

Decided: Apr. 15, 1982

Filed: Apr. 15, 1982

/s/ Thomas J. Kearney
Clerk

xc: Boyd L. Henderson (4/15/82)
Richard Echols
Gary Cheatham
H. E. Degreenia

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the court.

Relator Intake Water Company filed a petition for a writ of mandate to compel the Board of Natural Resources and Conservation and the Department of Natural Resources and Conservation to assign a priority date of January 14, 1975, to the water rights application of defendant Utah International, Inc. The District Court dismissed Intake's petition. We affirm.

On November 20, 1973, Utah filed its application in Wyoming, on Wyoming forms, to appropriate 106,730 acre feet from the Powder River, one of the rivers subject to the Yellowstone River Compact, section 85-20-101 et seq., MCA. The water was to be diverted in Wyoming

for ultimate uses in Montana which include industrial, irrigation, municipal and recreation.

Pursuant to Art. VII B of the Compact, the Wyoming state engineer sent duplicates of Utah's application to Montana which were received by the Department on December 4, 1973.

Article VII B & C provide as follows:

> "B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.
>
> "C. Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used."

These duplicates contained much of the same information that is required on the Montana forms.

On March 15, 1974, the Department notified Utah that if it filed the information for the same project on Montana's forms, the priority date of November 20, 1973, would be retained. The Department noted that the filing would be pursuant to sections 85-2-301 and 85-2-302, MCA, the latter of which provides in pertinent part:

> "The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the appli-

cation is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. *If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refiling* the application with the corrections with the department. An application not corrected within 18 months shall be terminated." (Emphasis added.)

On April 4, 1974, Utah replied that they intended to file applications for beneficial water use permits on the forms prescribed by Montana.

On September 27, 1974, Intake filed a Montana application with the Department and simultaneously filed a Wyoming application with the Wyoming state engineer. Duplicates of each application were filed in the other state at the same time. Intake plans to divert (for industrial, municipal, irrigation and other uses) 564,400 acre feet from the Powder River in Montana by a dam and resulting reservoir which will extend from Montana into Wyoming.

On November 18, 1974, the Department informed Utah that the Department had not yet received the applications for permits to appropriate the water on the Montana forms. On January 14, 1975, Utah filed the appropriate forms and paid the filing fee. The Department assigned Utah the Wyoming priority date of November 20, 1973. Intake made repeated demands upon the Department to change the priority date that had been assigned to the applications filed by Utah, contending that the priority date should have been the date that the corrected documents were filed with the Department, January 14, 1975. The Department refused to do so.

On March 6, 1975, Intake filed an action with the District Court of Lewis and Clark County seeking a writ

of mandate to compel the Board and the Department to assign a priority date of January 14, 1975, to Utah's application. On the same day the District Court issued an alternative writ of mandate requiring the Board and the Department to show cause why they had not assigned the requested priority date.

On August 21, 1975, plaintiff filed an amended application for writ of mandate and defendants filed a motion to quash and dismiss the action. About October 14, 1975 (and still within the time allowed by the State District Court for the parties to file briefs in response to the above motions and to answer interrogatories), Utah filed a declaratory judgment action against Intake in Federal District Court in Billings and asked that court to adjudicate the rights of both parties in their attempts to appropriate the Powder River waters, Utah Internat'l Inc. v. Intake Water Co. (1976), 484 F.Supp. 36.

On December 15, 1975, the State District Court stayed all proceedings in that court pending a ruling of the Federal District Court. The Federal District Court declined jurisdiction but construed the Yellowstone River Compact to require the application of Wyoming law and stated that Wyoming courts did not have sole jurisdiction, 484 F.Supp. at 45.

On January 8, 1980, the State District Court dissolved its stay and allowed further briefs and prehearing conferences. On February 25, 1981, after hearing, the District Court granted defendants' motions to quash and dismiss the amended application in a 20-page order in which the District Court found no clear legal duty under the Yellowstone River Compact or Montana water laws requiring the Department to assign the later priority date requested by Intake. On March 16, 1981, the District Court entered judgment dismissing with prejudice any further mandamus proceedings by Intake but without prejudice to any other remedy Intake might have. Intake appeals.

The issue on appeal can be stated as follows: Should a writ of mandamus issue to require the Department to assign a priority date of January 14, 1975, to Utah's water rights application?

All parties agree that a writ of mandate can be used to compel the performance of an act which the law requires as a duty resulting from an office. Section 27-26-102, MCA, provides in pertinent part:

> "*When and by whom issued.* (1) It may be issued by the supreme court or the district court or any judge of the district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office . . ."

It is equally clear that the writ will only issue where there has been a showing that a clear legal duty exists and there is no speedy or adequate remedy in the ordinary course of law. Cain v. Department of Health (1978), 177 Mont. 448, 582 P.2d 332.

The basic thrust of Intake's argument is that Montana's Water Use Act controls over the Compact, mandating the assignment of the January 14, 1975, priority date. Intake argues that there are various reasons why a writ of mandate lies in the instant suit.

First, Intake contends that a writ of mandate lies to compel the performance of a nondiscretionary act, McCarten v. Sanderson (1941), 111 Mont. 407, 109 P.2d 1108, and the assignment of Utah's priority date is such an act. Intake further cites sections of Montana's Water Use Act and reasons that the Department has no discretion to assign an earlier date than the date Utah's applications were received on the Montana forms. These sections provide in pertinent part:

"85-2-401. *Priority* . . .

"(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department . . .

"85-2-302. *Application for permit.* Except as otherwise provided in (1) and (2) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. *The application shall be made on a form prescribed by the department.*" (Emphasis added.)

Second, Intake argues that a writ of mandate is a proper remedy to compel the undoing of a thing wrongfully or improperly done that denies a person the rights to which he is entitled, citing State ex rel. Mallott v. Cascade Co. (1933), 94 Mont. 394, 22 P.2d 811. Other reasons given by Intake for the issuance of a writ of mandate include: if an agency follows a fundamentally wrong rule, the agency can be compelled to follow the law by mandamus, citing State ex rel. Bourquin v. State Board of Equalization (1923), 67 Mont. 340, 215 P. 667; and an agency has an implied legal duty to undo any action taken in violation of a statute, citing Parks v. Board of Co. Commissioners of Tillamook Co. (1972), 11 Or.App. 177, 501 P.2d 85.

Intake also argues that the application of Compact Article XVIII to Article VII (set out above) results in the conclusion that nothing in the Compact is intended to divest Montana of jurisdiction over its allocated waters and thus the provisions of Montana's Water Use Act should apply. Article XVIII provides as follows:

"Article XVIII

"No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or inter-

> preted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

The Board, the Department and Utah contend that a writ of mandate should not issue for several reasons. First, the Department did not violate any clear legal duty but followed the controlling laws of the Compact and Act. These parties reason that the Compact is similar to a treaty, since it was approved by Congress, and state law is subordinate to it. Since Article VII, paragraph B, of the Compact states that the adjudication is to conform with the laws of the state of diversion, the Department correctly gave Utah the Wyoming priority date. These parties point out that in the Wyoming adjudication process, the priority dates relate back to the date of the application, i.e. November 20, 1973.

Also, these parties argue that a writ of mandate cannot issue because Intake has plain, speedy and adequate administrative remedies; that the Department did not follow a fundamentally wrong rule; and that a writ of mandate is not a proper remedy to undo an act already done. Finally, respondents contend that the Department did not divest itself of its jurisdiction of the water allocated to Montana under the Compact, i.e. the Department required Utah to correct its filings on the Montana forms insuring that water charged against its Compact allocation is beneficially used.

We note that this Court has recently addressed our scope of review on application for a writ of mandate:

> "This Court is aware that a District Court's decision to grant or deny a writ of mandate is a matter of discretion and will be sustained on appeal in the absence of a showing of abuse of discretion." Ingram-Clevenger, Inc. v. Lewis and Clark County (1981),

—— Mont. ——, 636 P.2d 1372, 1374, 38 St.Rep. 1696, 1699.

The District Court in this case did not abuse its discretion in denying the writ.

Here a writ of mandate cannot issue because there is no clear legal duty requiring the Department to assign Utah the January 14, 1975, priority date. *Cain*, supra. The Compact, signed by Wyoming, Montana and North Dakota and ratified by Congress (on October 20, 1951) has the status of a treaty and state law is subordinate to it. See Hinderlider v. LaPlata River & Cherry Creek Ditch Company (1938), 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed 1202 (an interstate compact between Colorado and New Mexico was found to be controlling over a Colorado State water decree). Thus, Montana's water statutes are subordinate to the Compact provisions.

Article VII, Section C, of the Compact provides that each adjudication must conform with the laws of the state where the water is diverted. Wyoming is the state of diversion in this case. Intake does not attack Utah's original filings in Wyoming on November 20, 1973. Thus, the Department correctly assigned the November 20, 1973, priority date to Utah in conformity with Wyoming law as required by the Compact.

Intake could not prevail even under Montana law. The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah the priority date of its first filing. It had no clear legal duty to do otherwise.

Affirmed.

/s/ Frank I. Haswell
Chief Justice

We concur:

/s/ Gene B. Daly

/s/ John Conway Harrison

/s/ Daniel J. Shea

/s/ John C. Sheehy

/s/ Frank B. Morrison

/s/ Fred J. Weber
Justices

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 81-209

STATE EX REL. INTAKE WATER COMPANY,
a Delaware Corporation,
Plaintiff, Relator, and Appellant,

vs.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA,
Defendants, Respondents, and Respondents on Appeal,

and

UTAH INTERNATIONAL, INCORPORATED,
a Delaware Corporation,
Defendant, Respondent, and Respondent on Appeal.

[Filed May 13, 1982]

ORDER

PER CURIAM:

The petition for rehearing is denied.
DATED this 13th day of 1982.

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ John Conway Harrison

/s/ Daniel J. Shea

/s/ John C. Sheehy

/s/ Frank B. Morrison

/s/ Fred J. Weber
Justices

xc: Boyd Henderson 5/14/82
Richard Echols

May 14, 1982

APPENDIX H

A. *The Yellowstone River Compact*, consented to, Public Law 83, 71st Cong., 1st Sess. (June 2, 1949), approved, Act of October 30, 1951, 63 Stat. 152, Public Law 231, Ch. 629.

YELLOWSTONE RIVER COMPACT

* * * *

Article I

A. Where the name of a state is used in this compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state shall be subject to the terms of this compact. Where the singular is used in this article, it shall be construed to include the plural.

Article II

A. The State of Montana, the state of North Dakota, and the state of Wyoming are hereinafter designated as "Montana", "North Dakota", and "Wyoming", respectively.

B. The terms "commission" and "Yellowstone River Compact commission" mean the agency created as provided herein for the administration of this compact.

C. The term "Yellowstone River basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries and includes the area in Montana known as lake basin but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River system" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "interstate tributaries" means the Clarks Fork; Yellowstone River; the Big Horn River (except Little Big Horn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the state of Montana.

G. The terms "divert" and "diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "beneficial use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "domestic use" shall mean the use of water by an individual or by a family unit or household for drinking, cooking, laundering, sanitation, and other personal comforts and necessities and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "stock water use" shall mean the use of water for livestock and poultry.

Article III

A. It is considered that no commission or administrative body is necessary to administer this compact or divide the waters of the Yellowstone River basin as between the states of Montana and North Dakota. The provisions of this compact, as between the states of Wyoming and Montana, shall be administered by a commission composed of one representative from the state of Wyoming and one representative from the state of Montana, to be selected by the governors of said states as such states may choose, and one representative selected by the director of the United States geological survey or whatever federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the states to sit with the commission and who shall, when present, act as chairman of the commission without vote, except as herein provided.

B. The salaries and necessary expenses of each state representative shall be paid by the respective state; all other expenses incident to the administration of this compact not borne by the United States shall be allocated to and borne one-half by the state of Wyoming and one-half by the state of Montana.

C. In addition to other powers and duties herein conferred upon the commission and the members thereof, the jurisdiction of the commission shall include the collection, correlation, and presentation of factual data, the mainte-

nance of records having a bearing upon the administration of this compact, and recommendations to such states upon matters connected with the administration of this compact, and the commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective states and shall compile a report for each year ending September 30 and transmit it to the governors of the signatory states on or before December 31 of each year.

D. The secretary of the army; the secretary of the interior; the secretary of agriculture; the chairman, federal power commission; the secretary of commerce, or comparable officers of whatever federal agencies may succeed to the functions and duties of these agencies and such other federal officers and officers of appropriate agencies of the signatory states having services or data useful or necessary to the compact commission shall cooperate, ex officio, with the commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the compact; and these officers may perform such other services related to the compact as may be mutually agreed upon with the commission.

E. The commission shall have power to formulate rules and regulations and to perform any act which it may find necessary to carry out the provisions of this compact and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the state engineer of each of the signatory states for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this compact, then the member selected by the director of the United States geological survey shall have the right to vote upon the matters in disagreement and such points of disagree-

ment shall then be decided by a majority vote of the representatives of the states of Wyoming and Montana and said member selected by the director of the United States geological survey, each being entitled to one vote.

G. The commission herein authorized shall have power to sue and be sued in its official capacity in any federal court of the signatory states and may adopt and use an official seal which shall be judicially noticed.

Article IV

The commission shall itself or in conjunction with other responsible agencies cause to be established, maintained, and operated such suitable water gauging and evaporation stations as it finds necessary in connection with its duties.

Article V

A. Appropriate rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory state as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each state for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

a. to Wyoming 60%
to Montana 40%

b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Big Horn River (exclusive of Little Big Horn River)

a. to Wyoming 80%
to Montana 20%

b. The point of measurement shall be below the last diversion from the Big Horn River above its junction with the Yellowstone River, and the inflow of the Little Big Horn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

a. to Wyoming 40%
to Montana 60%

b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (including the Little Powder River)

a. to Wyoming 42%
to Montana 58%

b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations in paragraph B 1, 2, 3, and 4 of this Article V shall be determined on an annual water year basis measured from October 1 of any year through September 30 of the suceeding year. The quantity to which the percentage factors shall be applied through a given date in

any water year shall be, in acre-feet, equal to the algebraic sum of:

1. the total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1 to that given date;

2. the net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1 to that given date;

3. the net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1 to that given date;

4. the quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1 to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the states of Montana and North Dakota below Intake, Montana, valid under the laws of these states as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams having their origin in either Montana or North Dakota, situated entirely in said respective states and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective states in which situated.

E. There are hereby excluded from the provisions of this compact:

1. existing and future domestic and stock water uses of water, provided that the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. devices and facilities for the control and regulation of surface waters.

F. From time to time the commission shall reexamine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

priorities of water rights;
acreage irrigated;
acreage irrigable under existing works; and
potentially irrigable lands.

Article VI

Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

Article VII

A. A lower signatory state shall have the right, by compliance with the laws of an upper signatory state, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River system not specifically apportioned to or appropriated by such upper state as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper state for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower state. Provided, that such right is subject to the rights of the upper state to control, regulate, and use the water apportioned to and appropriated by it. And provided further, that should an upper state elect, it may

share in the use of any such facilities constructed by a lower state to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

D. The use of water allocated under Article V of this compact for projects constructed after the date of this compact by the United States of America or any of its agencies or instrumentalities shall be charged as a use by the state in which the use is made. Provided, that such use incident to the diversion, impounding, or conveyance of water in one state for use in another shall be charged to such latter state.

Article VIII

A lower signatory state shall have the right to acquire in an upper state by purchase or through exercise of the power of eminent domain such lands, easements, and rights-of-way for the construction, operation, and main-

tenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

Article IX

Should any facilities be constructed by a lower signatory state in an upper signatory state under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

Article X

No water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone River basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

Article XI

The provisions of this compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

Article XII

This compact may be terminated at any time by unanimous consent of the signatory states, and upon such termination all rights then established hereunder shall continue unimpaired.

Article XIII

Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, in any federal court or the United States supreme court, for the protection of any right under this compact or the enforcement of any of its provisions.

Article XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof have actuated the signatory states in the consummation of this compact, and none of them, or the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

Article XV

This compact shall become operative when approved by the legislature of each of the signatory states and consented to and approved by the congress of the United States.

Article XVI

Nothing in this compact shall be deemed:

(a) to impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities in and to the use of the waters of the Yellowstone

River basin or its capacity to acquire rights in and to the use of said waters;

(b) to subject any property of the United States of America, its agencies, or instrumentalities to taxation by any state or subdivision thereof or to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any state or political subdivision thereof, state agency, municipality, or entity whatsover in reimbursement for the loss of taxes;

(c) to subject any property of the United States of America, its agencies, or instrumentalities to the laws of any state to an extent other than the extent to which these laws would apply without regard to the compact.

Article XVII

Should a court of competent jurisdiction hold any part of this compact to be contrary to the constitution of any signatory state or of the United States of America, all other severable provisions of this compact shall continue in full force and effect.

Article XVIII

No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact.

* * * *

B. *Relevant Portions of Montana Water Use Act* of 1973, Title 89, Ch. 8, Revised Codes of Montana, 1947 (now Title 85, Ch. 2, Montana Code Annotated).

CHAPTER 2

SURFACE AND GROUNDWATER

• • • •

Part 1

General Provisions

85-2-101. Declaration of policy and purpose. (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.

(2) A purpose of this chapter is to implement Article IX, section 3(4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that the system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages

the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for groundwater recharge.

(4) Pursuant to Article IX, section 3(1) of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(6) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(7) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(9) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(10) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

(12) "Slurry" means a mixture of water and insoluble material.

(13) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(14) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(15) "Water division" means a drainage basin as defined in 3-7-102.

(16) "Water judge" means a judge as provided for in Title 3, chapter 7.

(17) "Water master" means a master as provided for in Title 3, chapter 7.

(18) "Well" means any artificial opening or excavation in the ground, however made, by which ground water

is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

85-2-103. Measurement of water. (1) After July 1, 1899, a cubic foot of water (7.48 gallons) per second of time shall be the legal standard for the measurement of water in this state.

(2) Where water rights expressed in statutory or miner's inches have been granted, 100 statutory or miner's inches shall be considered equivalent to a flow of 2.5 cubic feet (18.7 gallons) per second, 200 statutory or miner's inches shall be considered equivalent to a flow of 5 cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of statutory or miner's inches.

(3) The provisions of this section shall not affect or change the measurement of water decreed by a court prior to July 1, 1899, but such decreed water shall be measured according to the law in force at the time such decree was made and entered.

85-2-104. Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state.

(2) The use of water for the slurry transport of coal is not a beneficial use of water.

85-2-111. Department powers. The department may:

(1) enter into agreements with federal, state, or local agencies necessary to carry out this chapter;

(2) apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal government or any other public or private source for the purposes of this chapter.

85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, declarations, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, declaration, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, declarations, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person, cooperate with, assist, and advise the person in matters pertaining to measuring water or filing declarations with the department or claims or existing rights with a district court under this chapter.

85-2-113. Board powers and duties. (1) The board may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices, except that the board may not require a meter on a water well outside of a controlled groundwater area or proposed controlled groundwater area unless the maximum yield of the well is in excess of 100 gallons a minute;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property.

85-2-114. Prevention of waste. (1) If the department ascertains, by means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take such steps as may be necessary to remedy the waste, unlawful use, or interference.

(2) The department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference.

85-2-115. Entry on land. Any employee or agent of the department authorized by the director may enter upon any land to carry out the purpose of this chapter, including but not limited to entry to make inspections the department considers necessary of proposed works, source of water, location of the proposed use, construction of works, and other inspections to ascertain whether or not persons are complying with this chapter. The department or its agent shall give reasonable notice to the landowner of its intention to enter upon the land. The department is responsible for actual damages done to any property.

85-2-116. Legal assistance. (1) When requested by the department, the attorney general and the county attorneys within their respective counties shall perform legal services and conduct legal proceedings necessary to carry out the purposes of this chapter. The department may also employ legal counsel to enforce this chapter and to conduct proceedings under it.

(2) If an appropriator who is a citizen of Montana becomes involved in a controversy to which any agency of the federal government or another state is a party,

the department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana.

85-2-117 through 85-2-120 reserved.

85-2-121. Administrative proceedings. The Montana Administrative Procedure Act governs administrative proceedings conducted under part 1 through 4 of this chapter, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding.

85-2-122. Penalties. A person who violates or refuses or neglects to comply with 85-2-301, 85-2-402(1), and 85-2-403(3), any order of the department, or any rule of the board is guilty of a misdemeanor.

85-2-123. Deposit of fees and penalties. Except as provided in 85-2-124, all fees and penalties collected under this chapter shall be deposited in the state general fund. All penalties or fines imposed by any court for a violation of this chapter shall be deposited in the general fund of the county where the court presides and shall be disposed of in the same manner as any other penalty or fine.

85-2-124. Fees for environmental impact statements. (1) Whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act and the application (or combination of applications) involves the use of 10,000 or more acre-feet per year or 15 or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within 30 days of receipt of a correct and complete application (or a combination of applications) if it deter-

mines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1), the applicant shall pay a fee based upon the estimated cost of constructing, repairing or changing the appropriation and diversion facilities as herein provided. The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale: 2% of the estimated cost up to $1 million; plus 1% of the estimated cost over $1 million and up to $20 million plus ½ of 1% of the estimated cost over $20 million and up to $100 million plus ¼ of 1% of the estimated cost over $100 million and up to $300 million plus ⅛ of 1% of the estimated cost over $300 million. The fee shall be deposited in the earmarked revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the application(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant at the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a certificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act, and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This section shall apply to all applications, pending or hereinafter filed, for which the department has not, as of April 9, 1975, commenced writing an environmental impact statement. This section shall not apply to any application, the fee for which would not exceed $2,500.

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may, in its discretion, rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its environmental impact statement.

85-2-125. Recovery of attorney fees by prevailing party. If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable attorney fees.

85-2-126 through 85-2-130 reserved.

85-2-131. Application for change of watercourse name. (1) All applications for the change of name of any watercourse or natural source of water supply, including natural streams, dry coulees, springs, lakes, rivers or creeks which lie wholly within the limits of one county must be made to the district court of the county where the watercourse or other natural source of water supply, the name of which is proposed to be changed, or some part thereof is situated. The petition must state in ordinary and concise language:

(a) a description of the watercourse or other natural source of water supply, the name of which is proposed to be changed, identifying the same as near as may be by natural monuments;

(b) the present name of the stream or other natural source of water supply and the name to which the petitioners desire the same to be changed together with the reasons for the desired change of name;

(c) the names of all persons or corporations owning real estate abutting upon or water rights upon the same whose titles appear of record in the office of the county clerk and recorder in the county in which the water course or other natural source of water supply, or some part thereof, is situated.

(2) The petition must be signed by not less than 10 owners of real property abutting upon said watercourse or other natural source of water supply or owning water rights upon the same.

(3) The insufficiency of the petition in any of the above respects shall not be held to defeat the jurisdiction of the court.

85-2-132. Change of watercourse name—public notice. When such petition is filed in the district court, the court or the judge thereof shall designate some newspaper of

general circulation in the county, such as to most likely to give all parties interested notice of the proceedings, and shall order that notice be published therein as hereinafter provided, and in his discretion he may require any other and further notice that to him may seem reasonable and shall fix a time at which objections to the granting of the petition for the change of name shall be heard. A copy of the petition, together with a notice of the time set for hearing objections thereto, shall be published in the newspaper designated by the court or judge for that purpose, at least once a week for 4 successive weeks, and such other and further notice of the proceedings shall be given as the court or judge may in his discretion require.

85-2-133. Change of watercourse name—hearing. At the time set for hearing or at any time prior thereto, objections may be filed by any person who can, in such objections, show to the court or judge good reason against such change of name. The application and the objections must be heard at such time as the court or judge may appoint. On hearing, the court or judge may examine on oath any of the petitioners, remonstrants, objectors, or other persons touching the application and may make an order changing the name or dismissing the application as to the court or judge may seem right and proper.

85-2-134. Change of watercourse name—judgment to be filed with county clerk. If the change of name be ordered, a copy of the judgment, duly certified by the clerk of the court, shall be filed with the county clerk and recorder of the county in which the watercourse or other natural source of water supply is situated, and the clerk of the court shall, annually, in the month of January, make a return to the office of the secretary of state of all changes of names made in the district court of his county under this section.

Part 2

Adjudication of Water Rights

85-2-201 through 85-2-210. Repealed. Sec. 37, Ch. 697, L. 1979.

85-2-211. Petition by attorney general. Within 20 days after May 1, 1979, the state of Montana upon relation of the attorney general shall petition the Montana supreme court to require all persons claiming a right within a water division to file a claim of the right as provided in 85-2-221.

85-2-212. Order by supreme court. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

* * * *

85-2-241. Water right adjudication account. There is established a water right adjudication account in the earmarked revenue fund of the state treasury. All fees collected under this section and 85-2-232 shall be deposited in the account to pay the expenses incurred by the state for administering this part, part 7, and Title 3, chapter 7.

85-2-242. Expenses to be borne by state. All expenses incurred by the state as a result of this part, part 7, and Title 3, chapter 7, are to be paid from the water right adjudication account in the earmarked revenue fund established in 85-2-241. Expenses include but are not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in administering this part, part 7, Title 3, chapter 7. If sufficient revenue is not available from the earmarked revenue fund, the expense shall be paid from the state's general fund.

85-2-243. Department assistance to water judges. The department, subject to the direction of the water judge,

shall, without cost to the judicial districts wholly or partly within his water division:

(1) provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights;

(2) establish information and assistance programs to aid claimants in the filing of claims for existing rights required by 85-2-221;

(3) conduct field investigations of claims that the water judge in consultation with the department determines warrant investigation; and

(4) provide the water judge with all information in its possession bearing upon existing rights, including all declarations filed with and all information gathered by the department with respect to existing rights in the Powder River Basin.

Part 3

Appropriations, Permits, and Certificates of Water Rights

85-2-301. Right to appropriate. After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

85-2-302. Application for permit. Except as otherwise provided in (1) and (2) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the office

of the county clerk and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 18 months shall be terminated.

85-2-303. Permit for conversion of nonproductive oil or gas well. A person who desires to convert a nonproductive oil or gas well to a water well may do so immediately but shall file a notice of completion or apply for a permit, depending on the maximum yield of the well, as otherwise provided in this chapter. The date of appropriation shall be the date of filing the notice of completion or the application for a permit.

85-2-304. Appropriation by state board of land commissioners. The state board of land commissioners may, through the department of natural resources and conservation, at its discretion, appropriate any available waters for use upon state lands and authorize the construction of irrigation works for these lands. The appropriation shall be made in the same way and under the same laws as those governing the appropriation of water by individuals.

85-2-305. Appropriation permit for reservoir. A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this chapter.

85-2-306. Exceptions to permit requirements. (1) Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating ground-

water by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion together with the reasons for returning it. A notice does not lose priority of filing because of defects, if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date or refiling a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section. An appropriation under this sub-

section is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream, and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the board under 85-2-113.

85-2-307. Notice of application. (1) Upon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice in a newspaper of general circulation in the area of the source once a week for

3 consecutive weeks. Before the last date of publication, the department shall also serve the notice by first-class mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation. A notice shall also be served upon any public agency that has reserved waters in the source under 85-2-316. The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation. The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 30 days or more than 60 days after the last date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons.

85-2-308. Objections. (1) An objection to an application must be filed by the date specified by the department under 85-2-307(2).

(2) The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, * * *

* * * *

by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent.

85-2-309. Hearings on objections. If the department determines that an objection to an application for a per-

mit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by certified mail upon the applicant and the objector. The department may consolidate hearings if more than one objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.

85-2-310. Action on application. (1) The department shall grant, deny, or condition an application for a permit in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant, or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons therefor by certified mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

(2) However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department or denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions, or limitations specified by it or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor. The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within 30 days after the notice is mailed. The notice shall fur-

ther state that the application will be modified in a specified manner or denied, unless a hearing is requested.

(3) The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for any of these reasons shall be accompanied by a statement of the reasons for which it was returned, and there shall be no right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection shall be deemed a final decision of the department.

85-2-311. Criteria for issuance of permit. The department shall issue a permit if:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

85-2-312. Terms of permit. (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.

(2) The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the

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85-2-318. Water right appropriation account. There is established a water right appropriation account in the earmarked revenue fund of the state treasury. All fees collected as provided in 85-2-113 shall be deposited in the account to help pay the expenses incurred by the department in administering this part, part 1, part 4, and part 5 of chapter 2, Title 85.

85-2-319 and 85-2-320 reserved.

85-2-321. Milk River Basin—suspension of action on permit—proposal. (1) In order to balance the need for the continued development of Montana's water and for protection of existing rights in the Milk River Basin, the

department may suspend action on a class of applications or may close a source in the basin and refuse to accept a class of applications or both, for a permit under this part to appropriate from that source in the basin.

(2) Suspension or closure, or both, may only be proposed by the department.

(3) The proposal must state the source in the basin and class of applications for which suspension or closure, or both, is being proposed and any of the following allegations:

(a) that the frequency of occurrence of unappropriated waters is such that:

(i) any new appropriation from the source for the class of application will adversely affect the rights of a prior appropriation from the source; or

(ii) any new appropriation from the source for the class of applications will interfere unreasonably with another planned use or development for which a permit has been given or for which water has been reserved in the source or

(b) that significant disputes or enforcement problems regarding priority of rights or amounts or duration of water in use by appropriators are in progress or will arise.

85-2-322. Hearing—order. (1) The department shall conduct a hearing on the proposed suspension or closure, or both. Notice of the hearing * * * than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice and proposal not less than 30 days before the hearing upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permitholder of water in the source.

(2) The department may by order suspend action on and shall close the source and refuse to accept a class of applications if it finds on the basis of the hearing that there is substantial evidence in support of the allegations required by 85-2-321 to be contained in the proposal.

(3) As part of fulfilling the requirements of 2-4-623, the order must define the source and must state the class of applications to which the suspension or closure, or both, applies.

(4) Upon adoption of the order, the department shall refuse to accept any application for a permit under this part for the class of application for which closure is ordered under this section and 85-2-321. If the order suspends action on pending applications, the department shall notify the applicant that action on his application is suspended.

(5) Upon notice under 85-2-307 of intent to combine the hearings under 85-2-309 with the hearings under this section, the deparment may suspend action on pending applications of the class until the hearing is conducted under this section and, as part of its final order, may grant, deny, or condition the applications under 85-2-306(2), 85-2-310, and 85-2-311 or continue the suspension under this section.

85-2-323. Request to modify suspension—order. (1) A person or public agency may request that an order be modified or revoked. The request must contain allegations supported by substantial evidence showing that the criteria in 85-2-311 can be met for an application or a class of applications from the source. If not so supported, the department may reject the request without a hearing.

(2) The department may by order after a hearing modify or revoke any order made as provided in 85-2-321 and 85-2-322 upon such notice and in such manner as is reasonable under the circumstances.

Part 4

Utilization of Water

85-2-401. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise * * *

* * * *

(3) Priority of appropriation perfected before July 1, 1973, shall be determined as provided in part 2 of this chapter.

85-2-402. Changes in appropriation rights. (1) An appropriators may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereafter prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-

308(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearings require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

85-2-403. Transfer of appropriation right. (1) The right to use water under a permit or certificate of water right shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department.

(3) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed

change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance * * * by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2) and hearings shall be held in accordance with 85-2-309.

85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases to use all or part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) This section does not apply to existing rights until they have been determined in accordance with part 2 of this chapter.

85-2-405. Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned his appropriation right under 85-2-404 or when another appropriator in the opinion of the department files a valid claim that he has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned, the department shall petition the district court which determined the existing rights in the source of the

appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings under this section shall be conducted in accordance with the Montana Rules of Civil Procedure, and appeal shall be taken in accordance with the Montana Rules of Appellate Civil Procedure.

(2) At the hearing, the burden of proof shall be on the department which must establish by a preponderance of the evidence that the appropriation has been abandoned under 85-2-404.

(3) The determination of the court shall be appended to the final decree. The department shall keep a copy of the determination in its office in Helena.

85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property * * *.

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under part 2 of this chapter shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent

or interfere with rights and priorities established in the final decree. The order settling the controversy shall be appended to the final decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection and the department may, in its discretion, intervene in the proceeding.

85-2-407 through 85-2-410 reserved.

85-2-411. Water turned into natural channels. Water appropriated under an existing right or pursuant to this chapter may be turned into the natural channel of another stream or from a reservoir into the natural channel and withdrawn or diverted at a point downstream for beneficial use, but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator. Water stored in a reservoir under an existing right or pursuant to this chapter which is turned into a natural channel for withdrawal or diversion and beneficial use downstream shall not be considered a part of the natural flow of that stream.

85-2-412. Return of surplus water to stream. In all cases where by virtue of prior appropriation, any person may have diverted all the water of any stream or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream and there shall, at any time, be a surplus of water so diverted, over and above what is actually and necessarily used by the prior appropriator, such person shall be required to turn and cause to flow back into the stream such surplus water. Upon failure to do so within 24 hours after demand being made upon him in writing, to him in person or at his place of abode, by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved for the damage resulting therefrom, in such sum as may be determined by court.

85-2-413. Diversion of natural flow of waters—when permitted. Any person, owning or in possession of lands susceptible of irrigation from any stream, the waters of which are so diminished by prior appropriations that a sufficient amount of water for the irrigation of his lands cannot be obtained from the natural flow of the stream, who shall construct a reservoir or shall purchase or lease water from a reservoir owned by the department * * * in water stored therein, which is so located that because of natural or other obstacles the water impounded therein cannot be conducted to the lands which he desires to irrigate, may, provided the stored water can be discharged into the stream in such a manner that it can be used beneficially by prior appropriators, divert the natural flow of the stream for the irrigation of his lands in lieu of an equal amount of stored water; provided, however, that such exchange can be made without injury to said prior appropriators.

85-2-414. Conduction of water. The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use. If it is necessary to conduct the water across the right-of-way of any railroad, it shall be the duty of the owners of the ditch or flume to give 30 days' notice in writing to the owner or owners of such railway of their intention to construct a ditch or flume across the right-of-way of such railroad, the point at which the ditch or flume will cross the railroad, and the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fail to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of the said flume or ditch to construct the same across the right-of-way of

such railroad without further notice to said owner or owners of the railroad.

85-2-415. Owners of water to sell surplus. Any person having the right to use, sell, or dispose of water and engage in using, selling, or disposing of the same who has a surplus of water not used or sold or any person having a surplus of water and the right to sell and dispose of the same is required, upon the payment or tender to the person entitled thereto of an amount equal to the usual and customary rates per inch or cubic foot of water per second, to convey and deliver to the person the surplus of unsold water or so much thereof for which the payment or tender has been made and shall continue to convey and deliver the same weekly so long as the surplus of unused or unsold water exists and the payment or tender is made as aforesaid.

85-2-416. Duty of purchaser to dig ditches. Any person desiring to avail himself of the provisions of 85-2-415 must, at his own cost and expense, construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him and pay or tender to the person having the right to the use, sale, or disposal thereof an amount equal to the necessary cost and expense of tapping any gulch, stream, reservoir, ditch, flume, or aqueduct and putting in gates, gauges, or other proper and necessary appli- * * *

* * * *

the delivery of the surplus water shall not be required as provided in 85-2-415.

85-2-417. Enforcement of right to surplus. Any person constructing the necessary ditches, aqueducts, or flumes and making the payments or tenders hereinbefore provided is entitled to the use of so much of the surplus water as said ditches, flumes, or aqueducts have the capacity to carry and for which payment or tender is made and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or

recovery of damages arising from a failure to deliver or wrongful diversion of the same.

85-2-418. Purchaser cannot sell surplus water. Nothing in 85-2-415 through 85-2-417 shall be so construed as to give the person aquiring the right to the use of water, as therein provided, the right to sell or dispose of the same after being so used by him or prevent the original owner or proprietor from retaking, selling, and disposing of the same in the usual and customary manner after it is so used as aforesaid.

Part 5

Groundwater

85-2-501. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Aquifer" means any underground geological structure or formation which is capable of yielding water or is capable of recharge.

(2) "Bureau" means the Montana state bureau of mines and geology provided for in 20-25-211.

(3) "Groundwater" means any fresh water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and which is not a part of that surface water.

(4) "Groundwater area" means an area which, as nearly as known facts permit, may be designated so as to enclose a single and distinct body of groundwater, which shall be described horizontally by surface description in all cases and which may be limited vertically by describing known geological formations should conditions dictate this to be desirable.

APPENDIX I

TENNECO INC. (Parent of Petitioner Intake) AND SUBSIDIARIES AND AFFILIATES

As of June 30, 1982

Tenneco Inc. (Delaware)	
Albright & Wilson Inc. (Delaware)	100%
Bush Boake Allen Inc. (New York)	100
De Koven Manufacturing Company (Wisconsin)	100
East Tennessee Natural Gas Company (Tennessee)	100
Eastern Insurance Company Limited (Bermuda)	100
ERCO Industries Inc. (Delaware)	100
EXCO Gathering Company (Delaware)	100
Gas Ships, Inc. (Delaware)	100
Houston Oil & Minerals Corporation (Nevada)	100
Houston Oil & Minerals Exploration Company (Texas)	100
Houston Oil & Minerals Products Company (Texas)	100
Houston Oil & Minerals Research & Development, Inc. (Texas)	100
Houston Oil International, Inc. (Texas)	100
Houston Data Venture (U.K.) Limited (United Kingdom)	100
Houston Oil & Minerals of Colombia, Inc. (Texas)	100
Houston Oil & Minerals of Dubai, Inc. (Texas)	100
Houston Oil & Minerals of Indonesia, Inc. (Texas)	100
Houston Oil & Minerals of Sharjah, Inc. (Texas)	100
Houston Oil & Minerals of The Netherlands, Inc. (Texas)	100
Houston Oil & Minerals of The Philippines, Inc. (Texas)	100
Houston Oil & Minerals of Tunisia, Inc. (Texas)	100
Houston Oil & Minerals of Umm Al-Qaiwain, Inc. (Texas)	100
Houston Oil & Minerals U.K., Inc. (Texas)	100
Houston Oil Colombiana, S.A. (Cayman Islands)	100
Agencies Petroleras, Ltda. (Colombia)	99
Houston Oil International of The Philippines, Inc. (Texas)	100
Tenneco Oil of Gabon, Inc. (Texas)	100

Houston Production Company (Texas)	100%
Houston Royalty Company (Nevada)	100
Intake Water Company (Delaware)	100
Lakefront Manufacturing, Inc. (Delaware)	100
Land Ventures Inc. (Delaware)	100
Lorneterm LNG Limited (Canada)	100
Midwestern Gas Transmission Company (Delaware)	100
Monroe Auto Equipment Company (Delaware)	100
E Z Ride Shock Absorber Company (Michigan)	100
Monroe Argentina S.A.I.C. y F. (Argentina)	100
Monroe Auto Equipment GmbH (Germany)	100
Monroe Auto Equipment S.A. France (France)	100
Monroe do Brasil Industria e Comercio Ltda. (Brazil)	100
Monroe Auto Pecas S.A. (Brazil)	80
Monroe Japan Co. Ltd. (Japan)	100
Regal Ride Shock Absorber Company (Michigan)	100
Sudinpar Holding Etablissement (Liechtenstein)	100
Tenneco Automotive International Sales Corporation (Delaware)	100
Unamuno, S.A. (Spain)	100
Seahorse Offshore Transmission Company (Delaware)	100
Shipping Ventures Inc. I (Delaware)	100
Shipping Ventures Inc. II (Delaware)	100
Shipping Ventures Inc. III (Delaware)	100
Speedy Muffler King, Inc. (Delaware)	100
SMK, Inc. (Delaware)	100
Tenneco Alaska, Inc. (Delaware)	100
Tenneco Border Company (Delaware)	100
Tenneco Coal Company (Delaware)	100
Tenneco Coal Conversion Co. (Delaware)	100
Tenneco Coal Gasification Co. (Delaware)	100
Tenneco Corporation (Delaware)	100
Blue Flame Gas Corporation (Delaware)	100
Channel Industries Gas Company (Delaware)	100
Collins Pipeline Company (Delaware)	80
Columbine Casualty Company (Colorado)	100
Direct Oil Corporation (Delaware)	100
B & M Oil, Inc. (Florida)	100
Direct Oil Corporation of Texas (Texas)	100
G & T Pipeline Company (Delaware)	100
Houston International Minerals Corporation (Texas)	100
Prometheus Minerals (Canada) Ltd. (Canada)	100
Tenneco Oil & Minerals of Australia, Inc. (Texas)	100
Windy Point Minerals, Ltd. (Canada)	100
Kern County Land Company (Delaware)	100
Boquillas Cattle Company (Arizona)	100
Tenneco Canada Corp. (Canada)	100

J. I. Case Company (Delaware)	100%
The Case Company (Wisconsin)	100
Case Engine Holding Company, Inc. (Delaware)	100
Davis Manufacturing Company (Delaware)	100
Drott Manufacturing Company (Delaware)	100
Grand Detour Plow Company (Wisconsin)	100
Kase, S.A. De C.V. (Mexico)	100
J. I. Case Argentina, S.A. (Argentina)	100
J. I. Case Canada Inc. (Canada)	100
J. I. Case do Brasil & Cia. (Brazil)	100
J. I. Case Credit Corporation (Wisconsin)	100
J. I. Case International, S.A. (Venezuela)	100
J. I. Case International Sales Corporation (Delaware)	100
J. I. Case Mfg. Company, Inc. (Wyoming)	100
J. I. Case Threshing Machine Company (Wisconsin)	100
Pryor Foundry, Inc. (Oklahoma)	100
Travelift and Engineering Corporation (Wisconsin)	100
Pueblo Del Sol Water Company (Arizona)	100
Tenneco West, Inc. (Delaware)	100
Ag-Ventures, Inc. (California)	100
California Almond Orchards, Inc. (California)	100
California Harvest Shops, Incorporated (California)	100
Cal-Date Company (California)	100
Grandma Mac's Orchard, Inc. (California)	100
H-M-T, Inc. (California)	100
Heggblade-Marguleas-Tenneco, Inc. (California)	100
House of Almonds, Inc. (Delaware)	100
Kern County Land Company, Inc. (California)	100
Kern Island Water Company (California)	99
Kern River Canal and Irrigating Company	98
Tenneco Farming Company (California)	100
Tenneco Property Development Corporation (California)	100
Marlin Drilling Co., Inc. (Delaware)	100
Bluefin Supply Company (Delaware)	100
Marlin Ethiopia, Inc. (Delaware)	100
Marlin International Drilling Company (Delaware)	100
Marlin-West Drilling Co., Inc. (Delaware)	100
MHC Drilling Co., Inc. (Delaware)	100
Mitchell Supreme Fuel Company (Delaware)	100
Newport News Shipbuilding and Dry Dock Company (Virginia)	100

Asheville Industries Inc. (North Carolina)	100%
Greeneville Metal Manufacturing, Inc. (Virginia)	100
The James River Oyster Corporation (Virginia)	100
Newport News Industrial Corporation (Virginia)	100
Newport News Industrial Corporation of Ohio (Ohio)	100
Newport News Offshore Systems Corporation (Virginia)	100
Newport News Reactor Services, Inc. (Virginia)	100
Newport News Technical Services Inc. (Pennsylvania)	100
Newport News Technical Services Inc. (Wisconsin)	100
Packaging Corporation of America (Delaware)	100
ABCO Cartage Company (Michigan)	100
The Corinth and Counce Railroad Company (Mississippi)	100
Mistal Inc. (Delaware)	50
Tennessee River Pulp & Paper Company (Delaware)	100
Petro-Tex Chemical Corporation (Delaware)	100
Red Diamond Oil, Inc. (Delaware)	100
Southwestern Management & Research Corp. (Delaware)	100
SWL Development Corp. (Delaware)	100
SWL Security Corporation (Texas)	100
T & M Terminal Company (Delaware)	80
Tenneco Aviation Limited (Delaware)	100
Tenneco Chemicals, Inc. (Delaware)	100
Heyden Newport Chemical Corporation (Delaware)	100
Nuodex Canada, Limited (Canada)	51
TCI International Sales Corporation (Delaware)	100
TENN-USS Chemicals Finance Corporation (Delaware)	50
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Tenneco Chemicals, Inc. owns 50%)	
Tenneco Chemicals Canada, Ltd. (Canada)	100
Tenneco Eastern Realty, Inc. (New Jersey)	100
Tenneco Financial Services Inc. (Delaware)	100
Tenneco Asset Management Company (Delaware)	100
Tenneco Inc. (Nevada)	100
Tenneco Insurance Company (Delaware)	100
Tenneco Life Insurance Corporation (Delaware)	100
Philadelphia Life Insurance Company (Pennsylvania)	100
Broad Arch Corporation (Pennsylvania)	100
Philadelphia American Life Insurance Company (Delaware)	100

Philadelphia Life Asset Management Company (Pennsylvania)	100%
Hedberg & Gordon, Inc. (Pennsylvania)	100
Investment Counsel International, Inc. (Pennsylvania)	100
Philadelphia Life Asset Planning Company (Pennsylvania)	100
Philadelphia Life Corporation (Pennsylvania)	100
Philadelphia Life Enterprises Inc. (Delaware)	100
Philadelphia National Life Insurance Company (Delaware)	100
San Francisco Life Insurance Company (California)	100
Southwestern General Life Insurance Company (Texas)	100
Southwestern Life Insurance Company (Texas)	100
Tenneco Minerals Company (Delaware)	100
Tenneco Ocean Metals Development Corporation (Delaware)	100
Tenneco Oil Company (Delaware)	100
Eco Pipeline Inc. (California)	100
LaTerre Development Corp. (Delaware)	100
LaTerre Petroleum of Italy, Inc. (Louisiana)	100
LaTerre Petroleum (U.K.), Inc. (Delaware)	100
LaTerre Petroleum (U.K.), Limited (United Kingdom)	100
Operators, Inc. (Delaware)	100
Q-S Petroleum, Inc. (Delaware)	100
Ship Channel Chemicals Company (Delaware)	100
Tenneco LaTerre, Inc. (Delaware)	100
Tenneco OCS Company, Inc. (Delaware)	100
Tenneco Oil Pipeline Company (Delaware)	100
Tenneco Retail Service Company (Delaware)	100
Tenneco Retail Service Company of Texas (Texas)	100
Tenneco Shale Oil Company (Delaware)	100
Tenneco Oil Company of Nigeria (Delaware)	100
Tenneco Phosphate, Inc. (Delaware)	100
Tenneco SNG Inc. (Delaware)	100
Tenneco Uranium, Inc. (Delaware)	100
Tennessee Argentina, S.A. (Delaware)	100
Tennessee Gas Pipeline Corporation (Delaware)	100
Tennessee Production Company (Delaware)	100
Tenngasco Gas Gathering Company (Delaware)	50
Tenngasco Inc. (Delaware)	100

HT Gathering Company (Delaware)	50%
TLC Oil Company (Delaware)	100
Walker Deutschland GmbH (Germany)	100
West Africa Corporation (Delaware)	100
Tenneco Oil Company of Nigeria (Nigeria)	100
Tenneco Credit Corporation (Delaware)	100
Tenneco Delta XII Gas Co., Inc. (Delaware)	100
Tenneco LNG International Inc. (Panama)	100
Tenneco InterAmerica Inc. (Delaware)	100
Tenneco International Energy, Inc. (Delaware)	100
Tenneco International Energy, Inc. (Panama)	100
Tenneco International Inc. (Delaware)	100
A B Staria-Werken (Sweden)	100
David Brown Traktor AB (Sweden)	100
J. I. Case Sweden A.B. (Sweden)	100
Case France, S.A. (France)	100
Societe Francaise Immobiliere Franim (France)	100
Case Iberica, Inc. (Delaware)	100
Case Iberica, S.A. (Spain)	100
Case Tracteurs S.A. (France)	100
Compania de Financiacion Case, S.A. (Spain)	100
Construcciones Agrometalicas Levante, S.A. (Spain)	100
David Brown Tractors GmbH (Germany)	100
David Brown Tractors S.A. (Pty.), Ltd. (South Africa)	100
J. I. Case (Australia) Pty., Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty., Ltd. (Australia)	100
J. I. Case Denmark, Inc. (Delaware)	100
J. I. Case Deutschland Beteiligungs GmbH (Germany)	100
Deutsche Poclain GmbH (Germany)	100
Chance GmbH (Germany)	100
Losenhausen Maschinenbau AG (Germany)	98
Lagus AG (Switzerland)	100
Vibromax France S.A.R.L. (France)	98
Wilhelm Weiler, Herstellung und Vertrieb von Strassenwalsen, GmbH (Germany)	100
J. I. Case (Japan) K.K. (Japan)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case S.W.A. (Proprietary) Ltd. (South West Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
J. I. Case (U.K.), Inc. (Delaware)	100
Leim Chemie GmbH (Germany)	100
Pit-Stop Auto Services GmbH (Germany)	100
Poclain do Brasil S.A. (Brazil)	100

P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99%
Poclain Hispana S.A. (Spain)	100
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (Poclain-Monroe-Petro-Tex) N.V. (Belgium)	100
Somadoc N.V. (Belgium)	100
Societe Anonyme Industrielle de Resines (France)	67
Speedy Inc. (Delaware)	100
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Europe, Inc. (Delaware)	100
Tenneco Domestic International Sales Corporation (Delaware)	100
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Ethiopia, Inc. (Delaware)	100
Tenneco Europe Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Guatemala, Inc. (Delaware)	100
Tenneco Holdings B.V. (Netherlands)	100
Gebr. Broere B.V. (Netherlands)	100
Depositas Del Notre, S.A. (Spain)	50
Nedol, B.V. (Netherlands)	100
Tank Terminals Rotterdam, B.V. (Netherlands)	100
Tankvaart Dordrecht, B.V. (Netherlands)	100
Tees Storage Limited (United Kingdom)	50
J. I. Case Europe B.V. (Netherlands)	100
Tenneco Colortrend B.V. (Netherlands)	100
Tenneco Transicol B.V. (Netherlands)	100
Nederlandsche Bewoid Maatschappij, B.V. (Netherlands)	100
Tenneco Holdings Denmark A/S (Denmark)	100
David Brown Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
Lydex A/S (Denmark)	100
Nordisk Case A/S (Denmark)	100
Tenneco Indonesia, Inc. (Delaware)	100
Tenneco International Marketing Company (Delaware)	100
Tenneco International N.V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Iran, Inc. (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco North Sea Netherlands, Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100
Tenneco Oil Company Norsk A/S (Norway)	100
Tenneco Oil Company of Argentina (Delaware)	100

Tenneco Oil Company of Peru (Delaware)	100%
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware)	100
Tenneco Saudi Arabia, Inc. (Delaware)	100
Tenneco South Africa, Inc. (Delaware)	100
Tenneco Sudan, Inc. (Delaware)	100
Tenneco Thailand, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100
Tenneco International Finance Corporation Ltd. (Delaware)	100
Albright & Wilson (Finance) Ltd. (United Kingdom)	100
Tenneco International Finance, Ltd. (United Kingdom)	100
Case Credit Limited (United Kingdom)	100
Tenneco International Finance BV (Netherlands)	100
Tenneco International Holdings Limited (United Kingdom)	100
Albright & Wilson Limited (United Kingdom)	100
A. Boake, Roberts and Co. (Holding), Ltd. (United Kingdom)	100
A. Boake, Roberts and Co. (SA) (PTY), Ltd. (South Africa)	100
W. J. Bush & Co., Ltd. (United Kingdom)	100
ACC (Fertilisers) Ltd. (United Kingdom)	100
The Farmers Co., Ltd. (United Kingdom)	100
FCL Crop Protection, Ltd. (United Kingdom)	100
Robt. Stephenson & Son, Ltd. (United Kingdom)	100
Albright & Wilson A/S (Norway)	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom)	100
Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom)	100
Albright & Wilson GambH (Austria)	100
Albright & Wilson Intertrade Ltd. (United Kingdom)	100
Albright & Wilson Investments (PTY), Ltd. (Australia)	100
Albright & Wilson (Australia) Ltd. (Australia)	57
Cardinol Products (PTY), Ltd. (Australia)	57

National Brands (PTY), Ltd. (Australia)	57%
Albright & Wilson (Langley) Ltd. (United Kingdom)	100
Albright & Wilson (Malaysia) SDN. BHD. (Malaysia)	100
Albright & Wilson Marchon (Pte) Ltd. (Singapore)	100
UIC Marchon (M) Sbn Bhd (Malaysia)	100
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)	50
Albright & Wilson (Mfg.) Ltd. (United Kingdom)	100
Albright & Wilson Overseas Ltd. (United Kingdom)	100
Akulu Marchon (PTY) Ltd. (South Africa)	50
Akulu Chemicals (PTY) Ltd. (South Africa)	50
Marchon-Paragon Holdings (PTY) Ltd. (South Africa)	100
Marchon-Paragon Sulphonation (Cape) (PTY) Ltd. (South Africa)	50
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa)	50
Albright & Wilson Aps (Denmark)	100
Albright & Wilson BV (Netherlands)	100
Albright & Wilson GmbH (Germany)	100
Albright & Wilson International Finance BV (Netherlands)	100
Albright & Wilson Ireland Ltd. (Eire)	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom)	100
Ibex Ltd. (Ireland)	100
Thawpit (Ireland) Ltd. (Ireland)	100
Albright & Wilson SpA (Italy)	100
Leopack SpA (Italy)	100
Marchon Espanola S.A. (Spain)	100
Marchon France S.A. (France)	100
Marchon Hellas Ltd. (Greece)	100
Marchon Italiana SpA (Italy)	100

Marchon Sud SpA (Italy)	100%
Albright & Wilson Pension Investments Ltd. (England)	100
Albright & Wilson Productos Quimicos Ltda. (Brazil)	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom)	100
E. P. Potter & Co. Ltd. (United Kingdom)	100
Albright & Wilson Scandinavia AB (Sweden)	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson (Warley) Ltd. (United Kingdom)	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom)	100
Astoria Shipping & Transport Co., Ltd. (United Kingdom)	100
Bush Boake Allen, Ltd. (United Kingdom)	100
Bush Boake Allen Australia, Ltd. (Australia)	100
Abveg Products (PTY) Ltd. (Australia)	100
Bush Boake Allen (Jamaica) Ltd. (Jamaica)	70
Bush Boake Allen (New Zealand) Ltd. (New Zealand)	100
Bush Boake Allen (SA) (PTY), Ltd. (South Africa)	100
W. J. Bush Estates (PTY) Ltd. (South Africa)	100
Southern Perfumery Company (Pty), Ltd. (South Africa)	100
Bush Boake Allen Zimbabwe (PVT) Ltd. (Zimbabwe)	100
Bush Boake Allen Singapore Pte Ltd. (Singapore)	100
GMB Proteins Ltd. (United Kingdom)	50
Klevas Aromer AB (Sweden)	100
Mortimer Investment Co., Ltd. (United Kingdom)	100
W. J. Bush & Co. Inc. (Delaware)	100
Clifford Christopherson & Co. Ltd. (United Kingdom)	100
Cumbria Trading Co., Ltd. (United Kingdom)	100

Electropol Ltd. (United Kingdom)	100%
Erco Industries Ltd. (Canada)	100
Bush Beake Allen Corporation Ltd. (Canada)	100
Dominion Fertilizers Co., Ltd. (Canada)	100
Dunville Mining Co. Ltd. (Canada)	100
Electric Reduction Sales Co., Ltd. (Canada)	100
Farm Protection, Ltd. (United Kingdom)	100
Knightsbridge Insurance Ltd. (Guernsey, Channel Islands)	100
LEO Lines, Ltd. (United Kingdom)	100
Mallison Feeds, Ltd. (United Kingdom)	100
Marchon Products, Ltd. (United Kingdom)	100
Mays Chemical Manure Co., Ltd. (United Kingdom)	100
Midox Ltd. (United Kingdom)	100
Proban Ltd. (United Kingdom)	100
The Scottish Chemical Co., Ltd. (United Kingdom)	100
Solway Chemicals, Ltd. (United Kingdom)	100
Stockport United Chemical Co. Ltd. (United Kingdom)	100
Thomas Tyrer & Co. Ltd. (United Kingdom)	100
Tryiux Paints Ltd. (United Kingdom)	100
Butler Chemicals Ltd. (United Kingdom)	100
Arndale Fuels, Ltd. (United Kingdom)	50
Bracey Petroleum Products, Ltd. (United Kingdom)	50
Compass Chemical Company, Ltd. (United Kingdom)	100
Tenneco Oil Products, Ltd. (United Kingdom)	75
Case-Poclain Limited (United Kingdom)	100
David Brown Tractors Limited (United Kingdom)	100
David Brown Tractors (Belfast) Ltd. (United Kingdom)	100
David Brown Tractors (Ireland) Ltd. (Ireland)	100
David Brown Tractors (Retail) Ltd. (United Kingdom)	100
A. M. Exports, Ltd. (United Kingdom)	100

Thompson & Stammers (Dunmow), Ltd. (United Kingdom)	100%
Tractorwork, Ltd. (United Kingdom)	100
Globe Petroleum Sales Limited (United Kingdom)	100
Golden Oil Products, Ltd. (United Kingdom)	100
Harmo Industries, Ltd. (United Kingdom)	100
Birmingham Filters Ltd. (United Kingdom)	100
Brames Ltd. (United Kingdom)	100
Rubber Suspension Ltd. (United Kingdom)	100
D. P. Miller & Sons Ltd. (United Kingdom)	100
Harmo Pressings Ltd. (United Kingdom)	100
Harmo Steel Co. Ltd. (United Kingdom)	100
Harmo Tubes Ltd. (United Kingdom)	100
F. Mould Ltd. (United Kingdom)	100
F. Mould (Silencers) Ltd. (United Kingdom)	100
J. W. Hartley (Motor Trade) Ltd. (United Kingdom)	100
Fisher & Mould Ltd. (United Kingdom)	100
Harmo Auto Services (Export) Ltd. (United Kingdom)	100
Harmo Auto Services Ltd. (United Kingdom)	100
Harmo Export Ltd. (United Kingdom)	100
Harmo Filters Ltd. (United Kingdom)	100
Harmo Technical Development Ltd. (United Kingdom)	100
Steering & Suspension Ltd. (United Kingdom)	100
Karobes Ltd. (United Kingdom)	100
Midland Trim & Equipment Ltd. (United Kingdom)	100
The Linford Engineering Co. Ltd. (United Kingdom)	100
J. I. Case Company Ltd. (United Kingdom)	100
Monroe Auto Equipment U.K. Limited (United Kingdom)	100

Pit-Stop Auto Services Limited (United Kingdom)	100%
Tenneco Chemicals Europe Limited (United Kingdom)	100
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco Malros Ltd. (United Kingdom)	100
Tenneco-Walker (U.K.) Limited (United Kingdom)	100
Tenneco United Kingdom, Inc. (Delaware)	100
Tenneco Venezuela, Inc. (Delaware)	100
Tenneco Walker B.V. (Netherlands)	100
Universaltrac Beteiligungs GmbH (Germany)	100
Intertrac Viehmann GmbH & Co. (Germany)	50
Intertrac A.G. (Switzerland)	100
Intertrac America Corporation (Delaware)	100
Intertrac G.B. Ltd. (United Kingdom)	100
Intertrac Italiana S.R.L. (Italy)	100
Rheinstahl Schmiedetechnic GmbH (Austria)	100
Tractortechnic Canada, Ltd. (Canada)	80
Walker Norge A/S (Norway)	100
Etablissement Robert Bellanger, S.A. (France)	100
Tenneco LNG Inc. (Delaware)	100
Tenneco Norway LNG Inc. (Delaware)	100
Tenneco Oil of Canada Ltd. (Alberta)	100
Tenneco Power Systems, Inc. (Delaware)	100
Tenneco Realty, Inc. (Delaware)	100
First National Services, Inc. (Delaware)	100
Immobiliaria Belgrado, S.A. (Mexico)	100
Ten Ten Travis Corporation (Delaware)	100
Tennchase, Inc. (Delaware)	100
Tenneco Realty Development Corporation (Delaware)	100
Stoco Mutual Water and Sewer Company (California)	80
Tennessee Gas Building Corporation (Delaware)	100
TRI Realty, Inc. (Texas)	100
Tenneco Trinidad LNG, Inc. (Delaware)	100
Tennessee Gas Services, Inc. (Delaware)	100
Tennessee Gas Transmission Company (Delaware)	100
Tennessee Ozark Gas Company (Delaware)	100
Tennessee Storage Company (Delaware)	100
Tennessee Trans-Anadarko Gas Co. (Delaware)	100
Walker Manufacturing Company (Delaware)	100
Walker Marketing Corporation (Wisconsin)	100

82-237

No. ____

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In The

Supreme Court of the United States

October Term, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner,

vs.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA AND CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND UTAH INTERNATIONAL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

RESPONDENTS'* BRIEF IN OPPOSITION

DONALD D. MacINTYRE
Special Assistant Attorney General
Chief Legal Counsel
Montana Department of Natural Resources and Conservation
32 South Ewing
Helena, Montana 59620
(406) 449-3712

*Counsel for Respondents**

*Respondents who are Montana Governmental Agencies or Individuals

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Does the Yellowstone River Compact, which was approved by the signatory States of Montana, Wyoming and North Dakota and by the United States Congress, require Montana to recognize a priority of filing in Wyoming, even though the water which is the subject of that filing is to be used in Montana and was apportioned to Montana under the Compact, and Article XVIII of the Compact specifically provides that no signatory State shall be divested of jurisdiction of the water apportioned to that State?

2. Did the Montana Supreme Court violate the Yellowstone River Compact by ruling that Montana officials acted legally and pursuant to the Compact when the state assigned a priority of filing for the use of water in Montana by recognizing a prior competing filing in Wyoming?

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

RESPONDENTS'* BRIEF IN OPPOSITION

The Board of Natural Resources and Conservation of the State of Montana and Cecil Weeding, Viola Herak, William H. Bertsche, Charles L. Hash, Gordon G. Holte, Land M. Lindbergh and Richard Spalding, in their capacities as the individual members thereof; Department of Natural Resources and Conservation of the State of Montana; and Leo J. Berry, Director, Department of Natural Resources and Conservation of the State of Montana, who are the Montana governmental agencies and individuals, re-

spectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 645 P. 2d 383.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Review By This Court Is Precluded Because The Judgment Below Is Based On Adequate And Independent State Ground.

The Montana Supreme Court held that the State correctly assigned Utah International, Inc. (Utah) a priority in conformity with Wyoming law as required by the Yellowstone River Compact (Petitioners, Appendix F, 57a). It also held that the State correctly assigned Utah its priority date to the Montana Water Use Act.[1] This Court has long held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Mueller*, 296 U. S. 207, 210 (1935).

The inquiry is whether the Montana Supreme Court intended to rest its decision independently on state ground.

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1 The Court stated:

> "Intake could not prevail even under Montana law. The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for correction of defective filing. Utah filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah the priority date of its first filing. It had no clear legal duty to do otherwise."

See *Delaware v. Prouse*, 440 U. S. 648, 652 (1979). This intent is clearly expressed in the opinion below wherein the Montana Supreme Court stated:

> "Intake could not prevail under Montana law. The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah the priority date of its first filing. It had no clear legal duty to do otherwise."

645 P. 2d 383, Petitioner Appendix F, 57a.[2]

This language indicates that the decision is based on independent and adequate state grounds. Accordingly, review should be denied.

Petitioner argues that while the Montana Supreme Court added what would appear to be a state-law holding, such a holding was premised upon the concept that Montana was required under the Yellowstone River Compact to give effect to the Wyoming priority date, if properly filed in Montana. Petition for Certiorari, p. 11, note 17. While it is true that Utah filed its original application in Wyoming with duplicate filing in Montana pursuant to Article VII (B) of the Yellowstone River Compact, the premise for the State-law holding was that an application was filed in Montana (although on Wyoming forms) and Montana law specifically authorized the State to allow an applicant up to 18 months to correct and complete an appli-

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2 The discretionary statute referred to by the Montana Supreme Court is cited as 85-2-302, MCA. See Petitioner Appendix H, 87a-88a.

cation. Since the state statute was discretionary, no clear legal duty could exist for mandamus to lie. In the face of a discretionary act Petitioner could not prevail. The Montana Supreme Court so held. This holding is based on independent and adequate state ground. For that reason, review by this Court would not be appropriate.

2. There Are No Special Or Important Reasons For Review.

While it may be true that the outcome of this case may be important to the two competing companies whose proposed multi-million dollar projects are at stake, there is no basis to assume that this case or one similar to it will ever rise again. As Petitioner notes Article XVIII of the Yellowstone River Compact is unique to the Yellowstone River Compact and has heretofore not been included in other interstate compact. Petition for Certiorari, p. 13.

The Article XVIII issue raised by Petitioner has heretofore not been addressed by this Court.[3] The fact that a given issue has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari. Further the Article XVIII issue in the present case is unlikely to recur and is too narrow to warrant review by this court on certiorari. It can only arise in the Yellowstone River Basin, between two or more competing water applicants, on a source of water where one project is necessarily preempted by the development of the other, where one or more of the applicants does not make recipro-

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3 There is no conflict between the various courts on this issue nor is there any real likelihood that one will arise given the fact that Article XVIII is unique to the Yellowstone River Compact.

cal contemporaneous duplicate filings in both Montana and Wyoming pursuant to Article VII of the Compact, and where Montana exercises its discretionary powers in accepting a correct and complete application for permit to use water. In a nutshell the questions raised by Petitioner turn on the particular facts of this case alone and are of interest only to the parties to it.

3. The Result Below Was Fair.

Under the appropriation rights doctrine beneficial use of water is the basis, the measure, and the limit of the water right. This is the doctrine used by the Yellowstone River Basin states for determining who has the right to use water at any given time. The first beneficial appropriation in time is prior in right to those rights established in each state. This doctrine continues to be recognized by Montana.[4]

The Montana Water Use Act of 1973 which created a permitting process for the acquisition of water rights in Montana provides in pertinent part at § 85-2-401 (2), MCA:

> "Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310 (3), and 85-2-313."

In accordance with Montana law, as between two competing applicants the applicant to first file for the right to

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4 Section 85-2-401 (1), MCA, provides:

> "As between appropriators, the first in time is the first in right."

use water is entitled to a priority of appropriation. Such a doctrine epitomizes fairness.

In the case before this court the proposed appropriations are in the Yellowstone River Basin and subject to the Yellowstone River Compact. As it applies to this case Article VII (B) of the Compact provides that each claim initiated for an appropriation of water in Wyoming for use in Montana shall be filed in the appropriate state office of Wyoming and a duplicate copy of the application shall be filed in the appropriate state office in Montana.[5] On November 20, 1973, less than 5 months after the implementation of the Montana Water Use Act of 1973, Utah filed its application in Wyoming, on Wyoming forms.[6] Duplicates of the Utah application were sent to Montana.[7] The duplicates contained much of the same information that is required on the Montana forms.[8] Some 10 months later, on September 24, 1974, Intake made its application filings in Montana and Wyoming.[9]

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5 Article VIII (B) provides:

> "Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used."

6 Opinion and Order of the Montana Supreme Court, Petitioners Appendix F, 50a.

7 Id. at 51a.

8 Id. at 51a.

9 Id. at 52a.

The practical effect of the Montana Supreme Court's holding is that because Utah made a substantive, good faith effort to comply with Article VII (B) of the Yellowstone River Compact and the Montana Water Use Act of 1973, Utah is entitled to priority of appropriation. Such a holding is fair. It is fair because it favors substance over form while recognizing the doctrine of "the first in time is the first in right."

Because the decision below is fair this Court need not exercise its extraordinary and discretionary jurisdiction.

4. The Opinion Below Was Accurate And Correct.

Petitioner centers its argument that the decision below was wrong on what it perceives as the Montana Supreme Court's failure to apply the mandate of Article XVIII of the Yellowstone River Compact. Petition for Certiorari, p. 15. Contrary to Petitioner's assertion, the court below was correct in rejecting the Article XVIII argument.

Article XVIII of the Yellowstone River Compact provides:

> "No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

It has been a long respected doctrine, recognized in both state and federal courts, that a state does not have extraterritorial jurisdiction to control water diversions in another state, even though the water was used within the first state. See generally, *Lindsey v. McClure,* 136 F. 2d 65 (10th Cir. 1943); *State ex rel. Sorenson v. Mitchell Irrigation District,* 129 Neb. 586, 262 N. W. 543 (1935).

Article XVIII of the Yellowstone River Compact is simply a restatement of the extraterritorial jurisdiction doctrine. By recognizing November 20, 1973 as the priority date of filing by Utah, Montana has acted in accordance with the provisions and mandates of Article VII of the Yellowstone River Compact. By so doing Montana has not attempted to extend its jurisdiction beyond its state boundaries all in accordance with Article XVIII of the Yellowstone River Compact.

Furthermore, the Court below, by its decision did not divest Montana of jurisdiction over waters of the Powder River allocated and apportioned to Montana under Article V of the Yellowstone River Compact. By recognizing November 20, 1973, as the priority date of Utah's filing, Montana has complied with Article VII of the Yellowstone River Compact as well as Montana state law.[10] Montana has not attempted to extend its jurisdiction beyond the state boundaries. Montana has not given up jurisdiction over the control of the use of water by Utah within the boundaries of the State of Montana.

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10 Section 85-2-401, MCA, provides that the priority of appropriation dates from the filing of an application for a permit with the Water Department of Natural Resources and Conservation. Section 85-2-302, MCA, provides that an application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the state within such time as the state allows, up to 18 months. As stated in the Montana Supreme Court Opinion (Petitioners, Appendix F, 51a), on March 15, 1974, Montana notified Utah that if Utah filed the information for the same project on Montana's forms, the priority date of November 20, 1973, would be retained pursuant to Sections 85-2-301 and 85-2-302, MCA. Utah filed the appropriate Montana forms within the 18 month period. Under Montana law Montana had no clear legal duty to do otherwise than to assign Utah the priority date of its first filing.

As the State has argued, throughout the proceedings below, and as Utah has conceded, Montana will regulate Utah's use of the Yellowstone River compact waters within Montana. Montana will decide if the use is beneficial, as required by Montana State law. Montana will regulate all construction by Utah within Montana. Montana will prevent Utah from wasting the water, will determine if Utah abandons the appropriation right and will have jurisdiction over any changes in the place of purpose of water use. Additionally, Montana will control water quality, and mitigate adverse environmental impacts which result from Utah's proposed water uses. Montana has jurisdiction over Utah's appropriation to the extent the water is used in Montana. Under the decision below there is no surrender of jurisdiction by Montana.

The result below was correct. For this reason, review by this Court would not be appropriate.

CONCLUSION

For all of the reasons outlined above, the Petition for Certiorari should be denied.

Respectfully submitted,

DONALD D. MacINTYRE
Special Assistant Attorney General
Chief Legal Counsel
Montana Department of Natural
Resources and Conservation
32 South Ewing
Helena, Montana 59620
(406) 449-3712

*Counsel for Respondents**

*Respondents who are Montana Governmental Agencies or Individuals

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CLERK

No. 82-237

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

RESPONDENT UTAH INTERNATIONAL INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

URBAN L. ROTH, ESQUIRE
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
(406) 782-1223
Counsel of Record for Utah International Inc.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that the state trial court did not abuse its discretion in denying a writ of mandate seeking to overrule a state agency's adjudication of private water rights—based upon an independent and adequate state ground?

2. Is the ruling below that "each adjudication [of water rights] must conform with the laws of the state where the water is diverted" consistent with the express terms to that effect in Article VII of the Yellowstone River Compact?

PARTIES TO THE PROCEEDING IN MONTANA SUPREME COURT

The caption of the case in this Court contains the names of all parties. Respondent, Utah International Inc., is a corporation and in compliance with Rule 28.1, U. S. Supreme Court Rules, lists, as follows, its parent company, subsidiaries and affiliates of each such corporation:

UTAH INTERNATIONAL INC. is a wholly owned subsidiary of GENERAL ELECTRIC COMPANY. The following lists the subsidiaries (except wholly owned subsidiaries) and affiliates of Utah International Inc.

Adobe Canyon Corporation
Cyprus Pima Mining Company
Goldsworthy Mining Limited
Lake Adair Corporation
McCamey Mining Limited
Orco Shipping Corporation
P. T. Arutmin Indonesia
Pathfinder Mines Corporation
Trapper Mining Company
Utah Development Company
Waipipi Iron Sands Limited

The following lists the subsidiaries (except wholly owned subsidiaries) and affiliates of General Electric Company.[1]

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1 General Electric Credit Corporation and General Electric Overseas Capital Corporation are wholly owned subsidiaries of General Electric Company but each has issued debt instruments which are publicly held.

General Electric-Goninan Engineering Services Ltd.

General Electric-Rickard Ltd.

F. R. Tulk & Co. Pty. Ltd.

Middle East Engineering Ltd.

Inducon do Brasil, Capacitores S. A.

Sade-Sul Americana de Engenharia S. A.

Canadian General Electric Co., Ltd.

Canadian Appliance Manufacturing Co., Ltd.

Electromat S. A. Fabrica de Materiales Electricos

Evansville Cable TV, Inc.

Condisa Limitada Ingenieros Contratistas, S. A.

Sud Americana de Electrificacion, S. A.

Storno S. A. (France)

SNEF Electro-mechanique (SEM)

Storno Electronic GmbH

Westdeutsche Quarzschmelze GmbH

SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.

Engineering Plastics, Ltd.

General Electric de Mexico, S. A.

Specialty Materials International B. V.

Philippine Electrical Manufacturing Company

Middle East Engineering Limited Saudi Arabia

Sadelmi Shaker Tamimi Construction Company

Charomel Investment (Pty.) Ltd.

EICSA (Proprietary) Ltd.

Magnet Wires (Proprietary) Ltd.

Reid & Mitchell (Pty.), Ltd.

SADE S. A.

General Electrik Turk Anonim

N. C. Joseph Limited

Sud Americana de Electrificacion, S. A.

Compagnia Generale Elettromeccanica S. p. A.

Iran Electrical and Mechanical Service Company

Middle East Engineering Limited—UAE

General Electric Philippines Meter and Instruments Co., Inc.

General Electric CAE International, Incorporated

General Electric Mortgage Corporation

Lonestar Florida Pennsuco, Inc.

In addition, General Electric Company holds directly or indirectly more than a 10% interest but not more than a 50% interest in the following:

Applied Materials, Inc.

Locke Insulators, Inc.

SADE Sociedad Anonima Constructora, Commercial, Insutrial, Financiera, Inmobiliaria de Mandatos

Technibel, S. A.

Elpro International, Limited

International General Electric Company, Limited

Societa Nazionale della Officine di Savigliano, S. p. A.

General Aircon, Ltd.

Japan Nuclear Fuel Company, Limited

Toshiba Electronic Systems Co. Ltd.

Toshiba Silicone Company Ltd.

Philippine Appliance Corporation

Philippine Glass Bulbs, Inc.

Defy Industries, Ltd.

Manufacturera de Aparatos Domesticos S. A.

Toshiba—General Electric Finance Corp.

Venezolana de Compresores y Motores S. A.

Rank-General Electric Housewares Pty. Ltd.

Rank-General Electric Major Appliances Pty. Ltd.

Philippine Electric Corporation

Smith & Stone Ltd.

Galileo Electro-Optics Corporation

Wavetek

Structural Dynamics Research Corporation

Gearhart Industries Inc.

Benerson Corporation

General Electric Asia Capital Corp.

General Electric International Operations Co., Inc.

General Electric International Sales Company

High Voltage Breakers, Inc.

Hydraulic Turbines, Inc.

Drive Systems Company, Ltd.

Watt & Ackerman, Pte., Ltd.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

RESPONDENT UTAH INTERNATIONAL INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent UTAH INTERNATIONAL INC. ("Utah International") filed on November 20, 1972, an application in Wyoming to appropriate water from the Powder River, one of the rivers subject to the Yellowstone River Compact (hereinafter "Compact") (Pet. App., p. 50a). The water

was to be diverted in Wyoming for ultimate uses in Montana, including industrial, irrigation, municipal, and recreational uses (Pet. App., pp. 50a-51a).

Pursuant to Article VII, Section B of the Compact (Pet. App., p. 69a), the state engineer of Wyoming sent duplicates of Utah International's application to Montana; those duplicates were received by the Montana Department of Natural Resources and Conservation (hereinafter "state agency") on December 4, 1973 (Pet. App., p. 51a). On March 15, 1974, the Montana state agency notified Utah International that if it filed the information for the water project on Montana's own forms, Montana would recognize the initial November 20, 1973, date—the date of the Wyoming filing—for purposes of determining priority of water rights (Pet. App., p. 51a).[1] The state agency noted that such a filing would comply with section 85-2-302 of the Montana Code Annotated, which provides, in pertinent part:

> "The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed, and refiled with the department within 30 days after its return or within a further time as the department may allow." (Pet. App., p. 87a.)

On April 4, 1974, Utah International replied that it intended to file applications for water use permits on the forms proscribed by Montana (Pet. App., p. 52a).

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1 The duplicate Wyoming forms sent to the Montana state agency contained much of the same information that was required on the Montana forms (Pet. App., p. 51a).

Subsequent to these events, on September 27, 1974, petitioner filed applications with Montana and Wyoming for plans to divert water from the Powder River in Montana, constructing a dam which would result in a reservoir extending from Montana into Wyoming (Pet. App., p. 52a).

On January 14, 1975, Utah International filed the appropriate Montana forms with the state agency (Pet. App., p. 52a). The state agency assigned that application the Wyoming priority date of November 20, 1973 (Pet. App., p. 52a). The state agency rejected subsequent demands by petitioner that the agency change that priority date to January 14, 1975, when the corrected Montana forms were filed (Pet. App., p. 52a).

Petitioner filed an action with the Montana state district court, seeking a writ of mandate to compel the state agency to assign Utah International a priority date of January 14, 1975 (Pet. App., pp. 52a-53a). The state district court dismissed the application for a writ of mandate because petitioner failed to show the state agency had a clear legal duty to do anything but confirm Utah International's November 20, 1973, priority date (Pet. App., p. 46a).[2]

An appeal was taken to the Montana Supreme Court, which affirmed the state district court's decision (Pet. App., pp. 49a-58a). The Montana Supreme Court held that

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2 In a related declaratory judgment action in the Federal District Court in Montana, the Federal District Court declined jurisdiction but construed the Compact as "mandating the application of Wyoming law in any adjudication . . ." (Pet. App., p. 19a).

the lower court did not abuse its discretion in denying the writ (Pet. App., pp. 56a-57a). The court stated that the Compact required the application of the laws of the state where the water is diverted, in this case Wyoming (Pet. App., p. 57a), and that the state agency properly assigned Utah International the November 20, 1973, priority date in conformity with Wyoming law (Pet. App., p. 57a). The Montana Supreme Court held that, even if petitioner were correct in urging the application of Montana law,

> "[*petitioner*] *could not prevail even under Montana law.* The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah [International] filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah [International] the priority date of its first filing. It had no clear legal duty to do otherwise." (Pet. App., p. 57a; emphasis added.)

On May 13, 1982, the Montana Supreme Court denied a Petition for a rehearing (Pet. App., p. 60a).

ARGUMENT

The ruling of the Montana Supreme Court is based upon an independent and adequate state law ground. In considering petitioner's argument that the Yellowstone River Compact required a state agency to adjudicate water rights under Montana law, the Montana Supreme Court held that petitioner "could not prevail even under Montana law" (Pet. App., p. 57a). The Montana Supreme Court ruled that petitioner could not prevail even if the Compact were interpreted as petitioner urged; it rejected petitioner's position as a matter of Montana state law.

To the extent the Montana Supreme Court discussed the Yellowstone River Compact, its discussion was entirely consistent with the terms of the Compact. The state court explained that "the Compact provides that each adjudication must conform with the laws of the state where the water is diverted," in this case Wyoming (Pet. App., p. 57a). This ruling is in accord with the express terms of Article VII, Section C of the Compact, which provides: "Each adjudication is to conform with the laws of the state where the water is diverted * * *" (Pet. App., p. 69a).

The court below also properly rejected petitioner's assertion that Article XVIII of the Compact required application of Montana law. Article XVIII provides only that the Compact shall not be construed "*to divest* any signatory state or any of the agencies or officers of such states *of the jurisdiction* of the water of each state as apportioned in this compact." (Pet. App., p. 72a; emphasis added). In the instant case, the Montana state agency was never divested of jurisdiction at any time; to the contrary, that agency maintained jurisdiction over the subject water at all times (Pet. App., pp. 51a-52a).

Basically this litigation involves a dispute between two private parties—Intake and Utah International—as to which corporation has the prior water appropriation date. When Intake eschewed any administrative remedy before the Department in favor of the mandamus court action involving Utah International, a great flurry of legal contentions from both Intake and Utah International were brought forth as to whether mandamus lay and whether the Department had violated a clear legal duty in refusing to change Utah International's priority date as demanded

by Intake. In the course of those legal interchanges, the significance of the various Compact provisions was raised by the parties and argued to meet their varying legal needs. But in so doing, this case wasn't elevated to anything of substantial federal (interstate) significance. Nobody other than Intake and Utah International has any real "stake" in the final outcome of the litigation. Montana, through its Department of Natural Resources, has never felt deprived of jurisdiction over the water in question by virtue of any Compact provision (Supreme Court Opinion, Pet. App., p. 56a).

I. The Ruling Below Is Based Upon An Independent And Adequate State Ground.

In rejecting petitioner's argument that the state agency should have applied Montana law and that such law required the agency to assign Utah International a later priority date for water rights, the Montana Supreme Court held that petitioner "could not prevail even under Montana law." (Pet. App., p. 57a). It is well settled that where, as in the instant case, "the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Supreme Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The record demonstrates that the Montana Supreme Court's holding—that petitioner could not prevail even if, as petitioner urged, the Compact required application of Montana law—constitutes an independent and adequate state ground to support the judgment.

The crux of petitioner's position, before both this Court and the Montana Supreme Court, is the assertion that the Yellowstone River Compact requires the Montana state agency to apply Montana state law in determining the priority date for respondent's filing (Pet., pp. 15-17; Pet. App., pp. 54a-56a). Petitioner totally ignores the critical holding of the court below—that it could not prevail under Montana law even if petitioner were correct in asserting that the Compact requires application of Montana law:

> "The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah [International] filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah [International] the priority date of its first filing. It had no clear legal duty to do otherwise." (Pet. App., p. 57a.)

II. The Ruling Below Is In Accord With Articles VII and XVIII of the Yellowstone River Compact.

The express terms of Article VII of the Compact completely refute petitioner's argument that the ruling below is inconsistent with the provisions of the Compact (Pet., pp. 14-20). Article VII, Section C of the Compact provides:

> "Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to *conform with the laws of the state where the water is diverted* and shall be recorded in the county

> and state where the water is used." (Pet. App., p. 69a; emphasis added.)

The terms of Article VII should dispel any doubt as to the question posed by petitioner—whether "Montana water officials correctly assigned [Utah International's] Wyoming priority date to [Utah International's] application in Montana." (Pet., p. 15). The clear language of Article VII demonstrates that the parties to the Compact intended to allow a signatory state to apply the laws of the state where the water is diverted (Pet. App., pp. 18a-19a).

There is no basis for petitioner's contention (Pet., pp. 12-14) that the ruling below is inconsistent with the principle expressed by the Compact in Article XVIII that

> "[n]o sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact." (Pet. App., p. 72a.)

Petitioner fails to come to grips with the distinction between a state agency's jurisdiction and the agency's choice of applicable law in making its decision. As the Montana Supreme Court noted, "the Department did not divest itself of its jurisdiction of the water allocated to Montana under the Compact"—to the contrary, the Montana state agency required respondent to submit its filings on the Montana forms, thus insuring the jurisdiction of Montana over the water (Pet. App., pp. 56a, 51a, 52a). At most, petitioner quarrels with the Montana state agency's decision in assigning priority dates; it is beyond dispute that the Montana state agency retained jurisdiction in the instant case.

The ruling below is in accord with both the terms and principles of the Compact. To find that the Compact bars a state from recognizing a priority date obtained in the state in which the water is diverted would lead to the emasculation of Article VII of the Compact. The goal of the parties to the Compact was to avoid "forum shopping" for water rights, by ensuring that the same substantive law of the state of diversion would be applied regardless of which state was adjudicating the water rights. Without this choice-of-law provision, parties would be free to seek conflicting priority dates from the state of diversion and from the state to which the water is apportioned. Under petitioner's theory, "Montana is awarded absolute and controlling authority over water apportioned to it by the Compact." (Pet., p. 17). The practical result would be to strip the law of the state of diversion of all effect—the antithesis of Article VII of the Compact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 12th day of October, 1982.

POORE, ROTH & ROBINSON, P.C.
/s/ URBAN L. ROTH

1341 Harrison Avenue
Butte, Montana 59701-4898

Attorney for the Respondent,
Utah International Inc.

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No. 82-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner

v.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL, INC.,
Respondents

REPLY BRIEF

E. BARRETT PRETTYMAN, JR.*
LEE LOEVINGER, P.C.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

HENRY LOBLE
PETER C. PAULY
LOBLE & PAULY, P.C.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601
(406) 442-0070

BOYD L. HENDERSON
Associate General Counsel
Tennessee Gas Transmission
Tenneco Building
P. O. Box 2511
Houston, Texas 77001
(713) 757-2131

* *Counsel of Record*

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF

(a) There is no independent and adequate state law ground supporting the ruling of the Montana Supreme Court.

The opinion below is analogous to the one rendered by the Supreme Court of Ohio and reviewed by this Court in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The state court there held that a broadcaster's telecast of the petitioner's "human cannonball" act was, *under state law*, a privileged invasion of his common-law "right of publicity", because the broadcaster's actual intent had not been to injure him or to appropriate the benefit of publicity for a private use. In so ruling,

the state court was influenced by two of this Court's First Amendment cases (*id.* at 567).

"There is no doubt", said this Court, "that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law" (*id.* at 566). Nevertheless, because the Ohio court apparently reached its decision in part on the basis of First Amendment principles, this Court granted certiorari and reversed. It did so despite a claim by the respondent that an adequate state law ground supported the decision below. This Court held that the First Amendment did not immunize the telecast from a state-law suit for damages. In so holding, however, the Court made clear that although the First Amendment did not *require* an exoneration of the telecast, "the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case" (*id.* at 578-579).

The teaching of *Zacchini* is that if, in interpreting state law, a state court rests its conclusion upon federal principles or interpretation, this Court has jurisdiction to correct the state court's ruling. And this is true even though the state court, once free of its prior erroneous interpretation of controlling federal law, may reach the same conclusion as before, this time *solely* on the basis of state law.

Similarly, in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), two religious organizations claimed exemption with respect to their school employees from taxes imposed by both federal and state statutes. The South Dakota Supreme Court interpreted the state's own statute as rendering non-profit church-related schools subject to taxation. However, since its interpretation rested in part upon an understanding of the federal statute and the First Amendment, this Court asserted its jurisdiction. It did so "* * * although, literally, [the judgment below] concerns the construction of a state statute" (*id.* at 780 n. 9).

This Court reversed, but stated: "While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper and, here, significant interpretation of the intertwined federal law" (*id.*). To the same effect are *United Air Lines, Inc.* v. *Makin*, 410 U.S. 623, 630-631 (1973), and *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

All of these cases are directly applicable to the instant one. The Montana Supreme Court did say, as respondents contend, that petitioner "could not prevail even under Montana law."[1] However, when one looks behind that statement, it is clear that the state court's conclusion was intertwined with, and dependent upon, the court's interpretation of the Yellowstone River Compact.[2] Put another way, it is inconceivable that the Montana Supreme Court, once freed from its erroneous interpretation of the Compact, would still hold that respondent Utah's prior filing in Montana was valid.[3] The only reason for that court's

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[1] This statement was *dictum*, addressed to what might happen if the case were returned for a hearing. Since there has never been a factual hearing in this case, the court could not have been ruling directly on whether or not petitioner could prevail upon remand.

[2] This is clear not only from the opinion itself but also from the fact that, as noted above, there has never been any evidentiary hearing in this case and thus no factual record from which any conclusions could be drawn except upon a facial reading of the Compact.

[3] Montana would be free, for example, to rule that under both the Compact and Montana law, petitioner Intake made the first-in-time filing in Montana. This would naturally follow because even respondent Utah does not claim that it originally filed in Montana on that State's forms, as required by Montana law (Utah's Brief, pp. 2-3). As the respondent Montana officials put it (p. 6), the duplicates of Wyoming forms filed in Montana "contained *much of the same information* that is required on Montana forms" (emphasis added; footnote deleted). Montana's courts should be allowed to hold that this was not sufficient.

holding was its assumption that Article VII of the Compact required due deference to Utah's actions. This assumption ignores the mandate of Article XVIII.

In any event, regardless of what the result would be upon remand, the Montana Supreme Court, like the South Dakota Supreme Court in *St. Martin Evangelical Lutheran Church*, "deserve[s] to be made aware of the proper and, here, significant interpretation of the intertwined federal law."

(b) Respondents assert that this case involves nothing more than a private dispute between two companies. This is no more a private dispute than *Zacchini* was a personal contest between the "human cannonball" and a television station. Larger interests are at stake in both instances. The fact that Montana is not in this Court in the position of protecting its own interests is also irrelevant, just as it was of no moment in *Zacchini* that the State of Ohio failed to appear and assert what its courts had a *right* to determine. At issue here is no less than the sovereign power of the State of Montana to control multi-state waters that have been allocated and apportioned to that State by an instrument having the combined weight of federal and State approval under Article I § 10 cl. 3 of the Constitution. Such an issue can hardly be characterized as a private one.

(c) Respondents argue that the Montana Supreme Court "rejected" petitioner Intake's interpretation of Article XVIII. The court did no such thing. It made one fleeting reference to the fact that Intake was relying upon Article XVIII (App. 55a-56a) but then made no further mention of the article. The court did not even attempt to interpret or explain the meaning of Article XVIII, much less show its interrelation with other articles, including the one relied on by respondents, Article VII.

(d) Respondents themselves—unlike the courts below—go to some length in an attempt to explain the meaning of Article XVIII. But there are two problems.

First, the arguments of attorneys may never be used to substitute for, or to fill the gaps in, judicial rulings. *Chiarella* v. *United States*, 445 U.S. 222, 235-237 and n. 21 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 539-540 and n. 15 (1978). Thus, even if respondents were right in their interpretation, it would do them no good insofar as the inadequacies found in the Montana Supreme Court's decision are concerned. This Court must assume that that court deliberately chose not to adopt the reasoning now put forward by respondents.

The second problem, however, is that respondents are wrong in their interpretation. Article XVIII evidences the intent of Congress and the signatory States to defer to the jurisdiction of a State over waters allocated to it for use under the Compact. Respondents—for the first time in any court—attempt to characterize Article XVIII as simply a restatement of an "extraterritorial jurisdiction doctrine". To the contrary, Article XVIII was designed to assure that the State to which waters have been allocated and apportioned will actually be able to control the use of those waters. It is a deference doctrine, pursuant to which the law of the State to which the waters are allocated and apportioned is deferred on critical issues. This is what Congress and the signatories intended: to defer to a State like Montana in the appropriation, regulation, administration and use of waters allocated and apportioned to that State.

The point is highlighted at page 9 of the respondent Montana officials' brief, where they list what they claim Montana can still do even under respondents' interpretation of the Compact. Notably missing from the list, however, is the one act that is crucial to all others if a State is to exercise effective control over waters apportioned to it: the ability to set dates of priority. Since everyone agrees that "first in time, first in right" controls in Montana, the inability of that State to fix correlative priority

dates is fatal to all other exercises of power. Put another way, forcing Montana to defer to a filing in Wyoming divests Montana of the right to control waters allocated and apportioned to it, because the date of priority of Utah's proposed appropriation has been effectively determined by the application of another State's law. The Compact never intended this subversion of the law of the State of allocation.

(e) This case is important not just to the parties but to the entire doctrine of deference to State law in relation to water rights. It is important that an interstate Compact, formally agreed to by the Congress and three States, be read properly and the rights of those proceeding under it upheld. Today it is Montana's law that is being flouted; tomorrow it may be Wyoming's or that of any other State to which water has been or may be apportioned by interstate compact.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
LEE LOEVINGER, P.C.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

HENRY LOBLE
PETER C. PAULY
LOBLE & PAULY, P.C.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601
(406) 442-0070

BOYD L. HENDERSON
Associate General Counsel
Tennessee Gas Transmission
Tenneco Building
P. O. Box 2511
Houston, Texas 77001
(713) 757-2131

* *Counsel of Record*

Counsel for Petitioner